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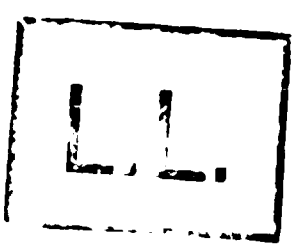

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REPORTS

OF

CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED IN THE

SUPREME COURT OF GEORGIA,

AT ATLANTA.

PART OF JANUARY TERM, 1871.

VOLUME XLII.

By N. J. HAMMOND, Reporter.

No.
Law Fcl
CINCINNATI COLLE

MACON, GEORGIA:
J. W. BURKE & CO., PUBLISHERS.
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JUDGES AND OFFICERS

OF THE

SUPREME COURT OF GEORGIA,

DURING THE PERIOD OF THESE REPORTS.

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HON. H. K. McCAY,.....*Americus.*

HON. HIRAM WARNER,.....*Greenville.*

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*Lochrane became Judge 20th August, 1870, resigned, and Hopkins became his successor 20th October, 1870.

†Kirby resigned and Harvey became Judge 25th October, 1870.

NOTE.

By Act of 1860, (Revised Code, section 4210), the decisions of th Supreme Court are required to "be announced by a written synop sis of the points decided." These decisions, thus announced from the bench, are, by the Judges, made the head-notes to the cases. Those head-notes followed by (R.) are by the Reporter.

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ERRATA.

Page 65, "in debt to them" should be, in debt to him.
" 95, "1850," in head-note, should be, 1830.
" 97, "distributors" should be, distributees.
" 106, "could rest" should be, could vest.
" 118, "avoid act" should be, a void act.
" 185, "$10,000" should be, $100 00.
" 192, "1822" should be, 1866.
" 212, "1863" should be, 1860.
" 362, "January, 1871," should be, January, 1866.
" 481, "the defense was" should be, the evidence was.
" 578, "Wiltberger, is his" should be, Wiltberger, in his.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Georgia,

AT ATLANTA,

JANUARY TERM, 1871.

Present.—O. A. LOCHRANE, CHIEF JUSTICE.
H. K. McCAY, } JUDGES.
HIRAM WARNER, }

GILBERT M. ANDERSON, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. An indictment, which alleged the offense to have been committed on the 13th day of August, 1868, and found by a grand jury, drawn according to the laws of the State which existed prior to the adoption of the Constitution of 1868, was a legal and valid indictment, though found subsequent to the date thereof.
2. When the defendant filed a special plea of insanity, but did not insist that there should first be a trial on that special plea, but went to trial on the general issue of not guilty, and relied on the insanity of the defendant to show that he was not guilty of the offense charged, it was not error for the Court to refuse to charge the jury that they might find a verdict either for or against the special plea of insanity, the Court charging the jury that they might find the defendant guilty, under the evidence, or not guilty.
3. There was no error in the charge of the Court to the jury, "that they were the judges of the law and the facts, so as to enable them to apply the law to the facts, and bring in a general verdict, but they had no right to make law; the law was laid down in the Code; it was the province of the Court to construe the law and give it in charge, and of the

jury to take the law as given, apply it to the facts as found by them, and bring in a general verdict;" and in refusing to charge as requested by defendant's counsel upon this point in the case.

4. The Court did not err in charging the jury, "that if the condition of the defendant's mind was such that he could distinguish right from wrong, good from evil, and while in that condition, killed his wife, the law would hold him responsible," and in refusing to charge as requested.
5. Under the 4599th section of the Code, it was the duty of the presiding Judge to have had the evidence in the case taken down, that is to say, all the legal evidence allowed to go to the jury; but as the record does not show any particular facts given in evidence, which the Court instructed the Clerk not to record, this Court cannot say whether the same were material or immaterial, legal or illegal, or whether the Court in its directions to the Clerk, expressed, in the presence of the jury, any opinion as to the evidence which was legally submitted to the jury for their consideration. To have made it error under the Code, it must be affirmatively shown that the Court expressed an opinion, in the presence and hearing of the jury, in regard to the evidence legally submitted to them on the trial.
6. It is the right of the witness to have the testimony read over to him, but not the right of the defendant's counsel that it should be so read; the legal presumption is that all the legal testimony in the case was correctly taken down under the direction of the Court.
7. In view of the facts of this case, there was no error in the Court which could have influenced or controlled the verdict, in refusing to allow Dr. Terry to explain to the jury "the structure of the brain, what changes were produced upon it by bodily disease, or how its irritation and inflammation was calculated to present to the mind unreal images, upon which a person with a diseased brain might be induced to act, as though the imaginary impressions were real existences."
8. The Court charged the jury that, "if, upon the whole evidence in the case, the jury entertain a reasonable doubt as to the sanity of the prisoner at the time of the commission of the alleged act, they are bound to acquit him:"

Held, That after a careful review of the evidence contained in the record, and the errors assigned therein, that the judgment of the Court below in refusing the motion for a new trial should be affirmed.

Murder. Insanity. Jurors. Before Judge JOHNSON. Muscogee Superior Court. May Adjourned Term, 1870.

At November Term, 1868, of said Court, said Anderson was indicted for the murder of his wife, in said county, on

the 13th of August, 1868. At said term, he pleaded that, at the time of the alleged commission of said act, charged in the indictment, he was insane; that he is subject to fits of insanity, and if such act was committed by him, it was committed when he was in a condition of lunacy. Issue was joined on this plea, and tried by a special jury, who found that, when said act was committed, (on the 30th of August, 1868,) said Anderson was sane. A new trial was moved for. Before it was heard, this Court had decided the case of *Long vs. The State*, 38*th Georgia Reports*, 491. Upon it, said verdict was declared null and void. In May, 1870, there was a motion to change the venue on the ground that an impartial jury could not then be had. It was supported only by Anderson's affidavit, and was overruled.

In July, 1870, the case was tried upon the plea of not guilty. The evidence was as follows:

STEPHEN QUARTERMAN testified: I know the prisoner. About the 30th of August, 1868, I met Sam Anderson in the road, and he told me that his father had killed his mother. I went over to prisoner's house, and found Mrs. Anderson lying at the gate, with her head cut very badly. I went into the house and found it on fire, the bed was on fire, the table afire, and dresses afire. I was looking for a bucket when I met prisoner in the shed-room; he advanced toward me, saying, "Quarterman this is my place, and I don't want to be interferred with." I left him and went back toward the gate. The fire was so hot that the gate posts were smoking; so I moved Mrs. Anderson across the road, about twenty-five steps, and then prisoner came out of the house with his coat on his arm and pipe in his hand, cleaning his pipe; he walked up the road to where Mrs. Anderson was lying, and stooped down and felt of her side, and took his knife and stabbed her about the waist. He drew his knife out and made at me; the other man fell over the fence in his fright, and ran entirely off. I jumped over the fence and took a rail in my hands; prisoner said, "Quarterman, don't strike me with that

rail, Quarterman, and I will not hurt you." Prisoner stepped back from the fence where Mrs. Anderson was lying with her head on a stick of wood, and said that he wanted to kill John Bachelor, Sally Anthony and Billy Bachelor. About this time Mr. Thomas Anthony rode up on a horse, witness then left; John Bachelor, Sally Anthony and Billy Bachelor were children of Mrs. Anderson by a former husband. The skull of Mrs. Anderson was split in three places to the brain. The killing was done in Muscogee county, about eight miles from Columbus. I saw prisoner setting one place on fire in the shed-room; the house was completely burned up, and so was the kitchen. When the prisoner stuck the knife into Mrs. Anderson I saw her draw her leg up. Mrs. Anderson asked me not to let prisoner kill her. Mrs. Anderson died in two days afterwards.

Cross-Examined: I had known the prisoner from Christmas until the time of the killing, about nine months. The prisoner made no attempt to get away from the place.

Re-Examined: His eyes looked natural. When I first saw him in the shed-room his face was unusually red.

AMOS L. ANDERSON testified: Myself, mother and father (the prisoner) were eating dinner in the kitchen, which was in the rear of the house. Father was quarrelling about some pot liquor, and took up a saucer of butter and some bread and went around the house and then came back and set it on the floor, and then went out and picked up a battering stick, and came again into the house, and as he was again going out, mother threw some warm dish water at him and on him, and followed after him into the house. Father caught up a drawing knife and turned on her and she ran. He followed her and cut her down between the piazza and gate, and cut her four or five times with the edge of the drawing knife on the head. She was lying on her side. Father ran after me, and I ran, because I thought he was going to kill me. I stopped at a distance and watched him. Father then went into the kitchen and got some fire, and

went into the house and set it on fire in many places, and went out and got the axe and cut the well-windlass and rope, and threw the bucket into the well, and then went back into the house. I went in the house and threw some water on the fire. He saw me and ran at me, and I jumped out at the window and went over to old man Anthony's. The prisoner is my father and Mrs. Anderson was my mother. My mother died in a few days. I am twelve years old.

Cross-Examined: Father had been at home from Thursday previous. He killed mother on Sunday. He was not drunk, and did not have any liquor in the house.

W. R. YOUNGBLOOD, M. D., testified: I was called to see Mrs. Anderson about three hours after she was cut. I found four or five mortal wounds in her head, either of which would have produced death. The wounds were made with a cutting weapon. She had a wound on her side, also her left little finger was cut off and also her shoulder was cut.

Cross-Examined: Her death was caused by the wounds on her head. The wound in her side was not a mortal wound. If, however, it had reached her heart, it would have produced instant death.

TESTIMONY FOR THE DEFENSE.

L. B. ANDERSON testified: I went to see my mother soon after the Mexican war, and I found my brother (the prisoner) in a very low state of health. Some years afterward he apparently got better. My mother informed me of his conduct, before I got there, relative to his treatment of her and of the family. She stated that she thought his mind was considerably injured since the war (*i. e.* the Mexican war). She said he was very troublesome to the family. I advised her to put him in the asylum. She also stated that he had attempted to take her life, and that she was much alarmed and feared he would do it. He had threatened, also, to burn up [illegible] plantation. My mother begged me to take him to my [illegible] in Harris county, stating that she disliked to put

him in the asylum, and thought I could manage him better. I replied that if they would send him to my place in Harris county, I would take charge of him. My mother and prisoner then lived in Baldwin county, near Milledgeville. Prisoner was sent to my house, and I treated him cautiously and kindly, and his health and mind got better. After several years had elapsed, I got him a position as overseer. In a short time he became, as I considered, insane, and I sent for him to come home to me. He remained with me for some time, until he be became, as I considered, competent to do business. I then got him a place at Mr. Pollard's. When I went to my mother's (at the time spoken of before), I found that he was kept in an out-house, with an attendant. While I was there, he attempted to commit suicide by cutting his throat with a razor. The wound was a very serious one. Dr. Harper, of Milledgeville, attended him. About fifteen days before the killing he came to my house in Harris county. When I saw him coming, I hardly knew him—he looked so changed in his appearance; but when he came to the gate, I recognized him. I met him at the gate, and he appeared to be considerably frightened. He said he was in great trouble and that I must not ask him any questions at that time. Having known him before, I knew that at that time he was deranged. I took him in the house and waited until the proper time and took him aside; and he told me that troubles at home were so great that he could not remain there, that his wife and her son Billy Bachelor had threatened to kill him, or that they would have it done; that he should not remain at home. I saw that his mind was wandering at that time about this matter. Prisoner seemed very excitable and nervous; he would stay some time in the house and some time in the bushes, but would not remain at any one place for any length of time. Prisoner said he had the dropsy, and requested me to come to Columbus and get him some medicine, which I did forthwith. After several days he took his mule and left, and went to some relatives of his.

I was with him while he was with his relatives, and saw his conduct, which was wild and strange. After a short stay he left his relatives, saying he was going to Mud Springs, and returned to his old home where the killing was done. Prisoner was twenty years old when he went to the Mexican war. Previous to that time he was very sociable, healthy and peaceable in his habits. After he returned he was not sociable. He also suffered very much from diarrhœa. He was very restless during his last visit to Harris county, and appeared to want to eat all the time. He had a blanket with him, and would leave his bed at night and go out in the woods and lie down, and then come back and continue to move about in this way during the night. I have another brother who is subject to temporary fits of insanity. I have still another brother who is perfectly sane.

Cross-Examined: Prisoner told me that he and his wife were always quarreling. He has often drank to excess while in Baldwin county, and afterwards. When I was in Baldwin county I was told that he went out into the horse-lot and gashed the horse with his knife, until he was stopped; I saw the scars. He was very abrupt to his mother and sisters. There was never any proceedings taken to put him in the asylum, for the reason that his mother thought I could control him. He married in 1854 or 1855, in Harris county, a widow, (the person killed,) who had some little property, and three children. Prisoner moved to his late home in 1854, or thereabouts. Prisoner is fifty-two years old, four years younger than myself. Mrs. Anderson, the deceased, told witness that she had found prisoner to be a good husband, but that he was not of sound mind at times, and witness told her that she must treat him kindly, and she said she knew that to be best.

Col. JAMES M. MOBLEY testified: The first time I ever saw prisoner was about twenty years ago, he was overseeing for Mr. Pollard; I saw him only a few times then. There was nothing unusual about him but a sad and melancholy

appearance. Some time after he went into the employ of one Daniel Hightower, as overseer. While he was there the family sent for Dr. Louis and myself, their attorney, to adjust a difficulty; when we arrived we found prisoner in a great rage and greatly excited, using profane language and gritting his teeth and foaming at the mouth. He proceeded with accusations against a negro man named Wash, viz: that Wash contemplated an outrage upon one of the ladies of the family, and declared that he had to be killed. The brother of the lady and the rest of the family were present, but did not believe it to be true, considering it merely a hallucination on the part of the prisoner; whenever the man, Wash, would pass in sight of prisoner he would rave and cry out that he must be killed, and as soon as he would pass out of sight, prisoner would weep like a child; this occurred several times. We investigated the charges against Wash and found them to be utterly unfounded. This seemed to enrage the prisoner more, and we failed to quiet him for a long time; during this time he appeared to be perfectly reckless and unreasonable, and in a fit of uncontrollable anger. After remaining a large part of the day, I took the prisoner off to himself and advised him to leave Mr. Hightower. He still insisted that he must kill Wash before he left, but finally consented to leave; I then left. I saw prisoner a few times after that, during Buchanan's presidential campaign. When not excited he appeared very reasonable and quiet. I saw him on a few occasions during the campaign very much excited. I saw him also several times after his marriage, and he was generally quiet, until the last time I saw him, which was in August, before and just previons to the killing; I met him in the road seven miles from Hamilton; he was so changed in appearance that I could scarcely recognize him; he looked to be in a very low state of health, and had a wild, unnatural look out of his eyes; he was riding on a mule. I asked him what was the matter; he replied that he was nearly dead, showed me his legs, and referred to his troubles, and

said he had no money to buy provisions and medicine, and would have to rely upon his friends for aid. He seemed ravenously hungry, and devoured with great rapidity some peaches that lay in the foot of my buggy. A few days afterwards he came to my house and stated that he was hungry, and wanted to wait until after dinner, which he did; he pulled out his pipe and walked out into the piazza and called me to come there; he seemed to be very much excited, and referred to his difficulties, his condition and his poverty; that his family had possession of everything, that he would have to die soon. His conversation and appearance was very unsatisfactory and unpleasant, his expressions were wild, and he said that he did not care to live. I am satisfied at the time of our conversation, just before the killing, he was insane, and at the time of my investigation at Hightower's he was an insane man. He was not under the influence of liquor at Hightower's, nor at the time of our last conversation spoken of.

Cross-Examined: Prisoner said that he was in great trouble about his wife and wife's kin. He conducted himself as men in his state do, while he was at dinner. He was considered a pretty good overseer while at Pollard's. He was under the influence of liquor a good deal during the presidential campaign.

Dr. CHARLES BEDELL testified: I saw the prisoner, for the first time, in the streets of Hamilton. We were approaching each other on the street, when he called to me in a loud voice to stop, and at the same time drawing a pistol and advancing close up to me, waving the pistol up and down. He was furious, and seemed to desire a difficulty with me. He was an utter stranger to me; I had never seen him before. I was very much frightened, but preserved my presence of mind, and addressed him kindly, and told him I was not the man he was looking for. His language was very violent, but he finally became quiet. My impression, at the time, was that he was some deranged man that had

escaped and come to the town. I was very close to him but could not discern an evidence of liquor. I walked with him to a store, and there some gentlemen got to talking to him, and advised him to become more quiet; he then became more quiet. He could give no reason for calling to me to stop.

Cross-Examined: He did not know my name and did not call me by name when he halted me. I cannot state, positively, whether his conduct was influenced by liquor; I did not smell liquor, nor did prisoner take any at the store where we stopped.

SAMUEL MCCANTS testified: The first time I ever saw prisoner was at Pollard's; he remained at Pollard's about a year. One morning I saw prisoner standing on my plantation; I hailed him and asked him what he was doing there; he did not speak, but motioned to me with his hand, in a very mysterious manner, to come there; I went to him and asked him what was the matter; he answered, that there were two men after him trying to catch him. I asked him what he had done; he said, "I have killed a man;" he seemed alarmed, and kept looking for some one to come after him. He would not go to my house to breakfast, but he ate some that I brought him, sitting on the ground. After he had finished his breakfast, he asked me to lend him my knife to protect himself with; I refused to give it to him. I asked him where he was going; he did not answer, but pointed to the woods, and went to the woods.

Cross-Examined: The prisoner stayed at Pollard's; he made a good crop. From what I could learn from him, he seemed to think that he had killed a man in Mobile. I was then Justice of the Peace in his district, and never heard him accused of killing anybody. Shortly after this, prisoner sent me word by Dr. Beall, "Please to put him in the Asylum."

Col. JAMES N. RAMSEY testified: I have known prisoner since about seventeen years ago. When I first knew him he was overseeing for my father-in-law, Mr. Pollard. He came about the middle of the year and remained until the end of the

year. During that time there was no violent paroxysm, but his mind seemed unhinged, and would literally fly to pieces, for very slight causes. He was not in the habit of drinking, while at Pollard's. I have seen the prisoner at various times; he came to my office and spoke to me about his troubles, and about some law-suits, but I could not understand, his conversation was so disjointed. I looked upon him as a man of unsound mind. This was a short time before the killing. He said that he wanted to die—and said that the Bachelor boys were killing all the stock in the neighborhood, and bringing them to town and selling them. After talking awhile, he would bow his head in his hands and weep excessively. I advised him to leave home and go to Harris county, for I thought a change of scene would benefit his mind. He was not drunk, at our interview. I have seen the prisoner drinking; he generally gets stupid when he is drinking.

Cross-Examined: He left Pollard's on account of a fuss with the foreman. When he was at my office he spoke about some business transacted by Colonel Mobley, but his language was so incoherent that I could not understand him. He said he did not want to commit murder—and did not want to be murdered. He seemed to be in great agony and would cry. All of his actions were like those of an insane man.

Dr. R. GOODLOE HARPER testified: He was a physician, living in Milledgeville, Georgia. He became acquainted with prisoner, soon after prisoner returned from the Mexican war—was physician then for prisoner's family. Prisoner was in very low health—had chronic diarrhœa and dropsy, and his brain was affected. Prisoner was reduced in flesh and very weak, and from the infirmities of his body, his mind was affected. He was melancholy and misanthropic. Witness recollected upon one occasion when he was called to [illegible] prisoner, witness was firmly convinced that he was in-[illegible], plied him with questions to test his mind and prison-

er's answers were incoherent and at variance with the questions; *e. g.*, when he asked him, "When are you going away," prisoner replied "I did;" thinking that probably he had misunderstood the question, he expounded and repeated and repeated it; there came the same reply, "I did." To other questions answers given were equally foolish. Prisoner was not then intoxicated. Was called in to see prisoner on one occasion and found his throat cut. Prisoner had tried to kill himself with a razor. He then showed evidences of insanity. His mother and sisters feared him. He was easily aroused by slight causes, and when so aroused was violent. I considered his mind diseased—proceeding from a diseased body. Witness has practiced medicine for about twenty-five years; is a regular graduate; has lived during his practice in Baldwin county, Georgia.

Mrs. L. A. GIBSON testified, that she is a sister to the prisoner. Lives in Baldwin county, Georgia. Prisoner volunteered in the Mexican war, from Baldwin county. Before, and at the time the prisoner left for the Mexican war, he was of a very easy and pleasant disposition and temper, and a healthy man; when he returned from said war, he was entirely changed; was very weak; could scarcely drag himself about, and was taciturn, sullen, and melancholy. He had diarrhœa, and doctors said he had dropsy. Witness' mother lived eight miles from Milledgeville. Witness and prisoner both lived with her. Witness and her mother were very much afraid of prisoner; he would be excited to frenzy by very slight causes, and often by no cause. They were cautious to address him only when necessary, and then in the mildest manner. While at his mother's, prisoner was kept in an out-house in the back yard. He was scarcely able to get about. He had no way to get to Milledgeville, except to walk, which he did not, because unable. He afterwards attempted to cut his throat with a razor; Doctor Harper attended on him while his throat was cut. Witness and her family now regarded him as an insane person, and sent him

to his brother, L. B. Anderson, of Harris county, who thought he could manage him. This was in the year 1850.

Dr. E. J. KIRKSCEY testified, that at the time of the killing he was County Physician. First saw prisoner at the gubernatorial election, in 1868, held at the Court-house, in Columbus, Georgia. Witness was one of the democratic challengers. Prisoner came up to vote with a radical ticket in his hand; witness asked him what was the reason he voted such a ticket; prisoner replied, "*if I don't they will kill me.*" Not long before the killing, while witness was attending at the poor-house of this county, he was approached by the prisoner in an excited and threatening manner; prisoner demanded possession of the poor-house, alleging that Governor Bullock had appointed him poor-house keeper, and that he meant *to have it;* witness noticed prisoner's strange and wild demeanor, and tried to explain to him his folly; warned him off, and stated that if prisoner had come any nearer, he would have killed him; witness thought him crazy; told poor-house keeper not to let prisoner come about there any more, and to use force, if necessary to such end. Prisoner went off, and a few days prior to the homicide, being shortly after the above interview, witness was approached by prisoner, in an humble manner, he, prisoner, desiring to be taken into the poor-house, alleging that he had been turned out of home and had no place to live at. Saw prisoner next, after the homicide, at the jail, two or three days after said homicide. Prisoner appeared rational, but on visiting him almost daily, he lapsed into a stupor, lasting for about eight or ten days, during which time I could get nothing from him. After that, he, (prisoner,) speaking to witness, said that Woolly (the prosecutor in the indictment,) had been there that morning and dunned him for ten cents, and thereat grew furious, and swore that if he had Woolly in that jail, with a gun each, he would mighty soon put an end to him. Prisoner had a severe looking scar on his head; don't know how deep it was; it is a place where, if deep enough, it

would affect the brain; prisoner had syphilis also, and a scar across his throat; prisoner had, also, an ulcer on his leg, which witness dressed.

Dr. SAMUEL A. BILLING testified: I have heard the testimony of the previous witness—my opinion is from the testimony. I have heard that, at the time of the killing, the prisoner was insane; laboring under that species of insanity called monomania. My opinion is, that he was insane at several periods of his life, as shown by the testimony.

Cross-Examined: Monomania is when a person is insane upon one subject. In this case, the disease of the prisoner was homicidal monomania.

DR. F. A. STANFORD testified: I have heard the testimony, and from that testimony I would say the prisoner was insane, said insanity partaking of moral insanity. Moral insanity may partake of homicidal mania, and I think the prisoner was affected with homicidal mania. I have practiced medicine twenty-two years.

Cross-Examined: My opinion is that this moral insanity existed in the prisoner from the time he came from Mexico, until the time of the killing. He, in all probability, had lucid intervals, sometimes of long and sometimes of short duration. I visited his wife after the cutting, and in returning went to the jail out of curiosity to see the prisoner. He was in a very feeble condition. A few days before the killing prisoner came to my office. He was very feeble, but could give no clear account of his health or condition; I saw the prisoner the next day after the cutting, in the jail; he looked very badly. I asked how he came to commit such an act. He looked at me in a wild and vacant manner, and replied, "Dr. I could not help it, I was crazy." The remark made an impression upon my mind, and has been a subject of grave reflection ever since, and in considering it with the evidence given in, it tended to convince me that he was the subject of moral insanity. I do not consider that the prisoner could distinguish between right and wrong at the time of the kill-

ing, (this last sentence was in answer to questions by the Judge presiding.)

DR. E. F. DEGRAFFENRIED testified: I have made a personal examination of prisoner; I examined his head in jail, and found a scar of an indenture in his skull; I concluded that it was sufficient to produce weakness of the mind. I think at the time of the Hightower difficulty he was laboring under some hallucination of the mind.

Cross-Examined: Prisoner stated to me that he received the wounds by a blow from a bar of iron, in the hands of a man in Milledgeville, Georgia; I regarded his account of it as rational. This interview was a year after the killing. I think there is evidence enough to show insanity at various times, and that there were times when he had lucid intervals. A man may be affected with homicidal mania and still conduct his usual business.

Dr. T. J. WOOD testified: My opinion from the testimony is, that at the time of the killing, the prisoner was an insane man. I have read all the evidence over taken down by the Clerk, both of the State and defense.

Cross-Examined: I make my opinion up from the testimony of Dr. Harper relative to the suicidal attempt, Col. Mobley's evidence, and others. Prisoner was a monomaniac in reference to troubles in prisoner's family, the subject of killing or being killed. Physicians might talk to an insane man, and yet not be able to discover his insanity.

Dr. V. H. TALIAFERRO testified: I have read the evidence in this case as taken down by the direction of the Court. I am a physician, have been practicing fifteen or eighteen years; from the evidence of the State and defense, I am of the opinion that he was insane at the time. I consider him an insane man, partaking of monomania, and his particular mania was homicidal mania. I examined the prisoner. I am very certain that his skull has been fractured, and very often such fractures result in mania, especially when there is a predisposition to mania.

Cross-Examined: I asked him how he came to have the gash in his skull, and he said it was done by a stick, after he came back from Mexico. His account of it was perfectly rational. My opinion of homicidal mania is based upon the evidence of Judge Samuel McCants, Dr. E. J. Kirkscey, Col. Mobley, Dr. Bedell, and others. I think the homicidal mania was connected with general mania. I had no acquaintance with prisoner before the killing. During my conversation with the prisoner at the jail, I brought him to the subject of his wife. He said that his wife and family had for a long time been his enemies; that they had desired to get rid of him or destroy him; that they had tried to do this by inviting persons to his (prisoner's) house to eat him out of house and home, and by these means to starve him; that his wife would invite large crowds of hypocritical Methodists to his house, and cause them to live upon him for weeks at a time, and by these means he was kept miserable and wretched. His difference in his manner while on this subject was conclusive to me that he was laboring under a delusion. I do not think, that at the time of the killing, prisoner knew good from evil.

FOR THE STATE, IN REBUTTAL.

H. L. ANTHONY testified: When I rode up, the morning of the killing, I found prisoner standing in the road, not far from his wife's body, smoking his pipe; he called out to me in a loud voice, saying, viz: "I have committed murder," not to hurt him, or let anybody else hurt him; that he would go with me, or any other man, to the sheriff; I told him to put up his knife and behave himself, and I would not let anybody hurt him; prisoner replied, "I will try and do so," and then he put up his knife. Prisoner said he wanted the law to take its course, and added, "if I am hung, I want you to have me buried at widow Brook's graveyard." Soon after this, Mrs. Anderson's son-in-law, J. L. Anthony, rode up; prisoner called out to him, also, saying, "I have commit-

ted murder." J. L. Anthony had a gun. Prisoner said, "Jud, don't you shoot me!" Jud replied, "you deserve shooting." While we were talking, a Baptist minister rode up; prisoner called out to him, saying, "I have committed murder, and I want a big Bible with big print." Prisoner said he had set the house on fire; I asked him why he had set the house on fire, and he replied, "I did it to keep it from doing Bill and John Bachelor any good;" the house was burning when I got there. Mrs. Anderson was lying on the left hand side of the road. My opinion, from facts testified to by myself is, that prisoner is a sane man.

Cross-Examined: I have sometimes doubted, in my own mind, his sanity, but watched him a long time, and saw him do no act, while sober, showing he was insane. I consider him sane at the time of killing.

Isaac T. Brooks testified: I have known the prisoner since 1837. I first knew him in Baldwin county for a period of about four years. Prisoner was a farmer, and a close neighbor to me. After I left Baldwin county, in 1841, I never saw prisoner any more until 1857; I saw him in a field and called him to the fence, and we had a conversation about when we were boys together; his conversation was rational. Just before the war, I had a long conversation with him at Mr. Whitten's; I saw nothing wrong about him. Prisoner stayed all night with me during the war, and we had a conversation about the war. I was the tax collector; collected taxes from him; I saw nothing wrong. I had a conversation with prisoner the Spring before the killing. He was a drinking man, and pretty rapid when drinking.

Cross-Examined: When I knew him, in Baldwin county, he was a very healthy and a very powerful man. He was a very sociable man when not drinking. When I saw him, during the war, he was considerably reduced, and not as cheerful as he formerly was; he appeared to be in very bad health and troubled. In the Spring before the killing, at the time spoken of by me before, his health was very bad.

I never heard of his attempting to cut his throat until after the killing.

Re-Examined: My opinion formed from the facts testified to by myself, and from my knowledge of him, is, that he was a sane man.

J. M. ALLEN testified: I knew the prisoner in Harris county, lived on an adjoining plantation in 1851. He was overseeing for Col. Pollard, saw him often. I knew him while he lived at Hightower's; knew him during the war. He was a good farmer, and an excellent overseer. Our conversation was concerning farming and negroes, and he talked with as good sense as any man I ever heard. From my knowledge of him I consider him a man of sound mind and good judgment.

Cross-Examined: I know nothing of the difficulty at Hightower's or McCant's.

GEORGE W. MARTIN testified: I arrested the prisoner the day of the murder. I met Mr. Woolly and prisoner and several others on the road. I told the prisoner that he was my prisoner, and prisoner asked me if I had got the warrant. I told him that I had none, but as sheriff of the county I had a right to arrest him. He submitted very willingly. I asked him on the way to jail how he came to commit the murder. He said his wife did not want to live with him, and had sued him for a divorce. He said he burnt the house because he did not want the Bachelor boys to have the benefit of it. He said he wanted a Bible with large print and a pair of glasses. That he killed his wife because she did not want to live with him, that he and John Bachelor had a fuss that morning and that Bachelor had drawn a knife on him. He had nothing with him but some medicine and his pipe. Never saw anything that looked like he was insane.

Cross-Examined: He was sober that day. He said that the Bachelor boys were against him, and that his wife sided with them. My first acquaintance with prisoner was in

1863; he was in feeble health; he never lived in my house, and I never lived with him.

GEORGE WHITTEN testified: I got to the house of prisoner about two or three hours after the killing. Prisoner said he had burnt his own house and killed his wife, and if he could kill Bill and John Bachelor and Sally Anthony he would be satisfied. I sold a place to him about three and a half years before the killing. From my acquaintance with him I would say he was the keenest man at a trade that I ever saw. I consider him sane.

W. H. ADAMS testified: I have known the prisoner since 1860. I lived about four miles of him for three years, and for one year within a mile. He has told me many times about an out-house in Baldwin county that his family confined him in, and that while he was there an old negro woman used to carry him liquor privately, by the bottle. He was a good neighbor; he used to visit me and I him. I considered him of sound mind. After the war, and his negroes were taken from him, he was not the same man. I always considered him sane. About two weeks before the killing, he saved me from drowning in the creek.

A. L. ANDERSON, (re-examined): John Bachelor was at father's house on the morning of the killing. Father and John had a quarrel. John Bachelor got the mule to go to church. Father said go after Bill Bachelor and bring him here, and I will go over into Alabama and fight him a duel.

Cross-Examined: I did not see John Bachelor draw a knife on prisoner. I would have seen it if he had done it.

JOHN C. DUCK testified: I have known the prisoner since 1863; lived a mile apart. Prisoner was a good neighbor to me. I was in the army with him; three or four weeks in the same company and in the same tent. He behaved very well as a soldier. I saw no evidence of insanity during that time. I never saw anything that would induce me to think him insane. When he was drunk he behaved very foolish, like he had no sense at all. About two weeks before the

killing, I found him drunk on the road; I took him in my wagon, and prisoner soon began to talk about his family, and said that he had a good wife, but she would take up with the boys; had more trouble than he could bear. He said he had been off at work, and could not stay at home. I was at prisoner's house about one hour after the killing. I went up to prisoner and spoke to him, and he said, "John Duck, how are you; I want you to go with me to George Martin's, (the sheriff)." I told him I would go after George Martin, and started, and prisoner said, "You can't arrest me without a warrant, and you will have to stand in the hot sun until you go to Columbus and get a warrant." I told him that we could take him to jail without a warrant, and he seemed much relieved. Mr. Comer, Mr. Woolly, and T. Anthony were guarding him when I got to the house.

S. S. JENKINS testified: I have known prisoner since 1857, lived on adjoining farms for a short time; he made good crops. I was guardian for the Bachelor children, and had business with prisoner; prisoner would take his receipts when he paid money. I lived near him from 1857 until 1863; from my acquaintance and dealings with him I never saw anything indicating insanity.

Cross-Examined: I loaned prisoner some money in 1863 to buy some lands. I have had but little business with him since 1863. When he was not in liquor he was a good neighbor and a kind man.

WILLIAM H. WALTERS testified: I have known prisoner since 1864. I was staying in the hospital, and when I went home prisoner had moved in the settlement; I was from that time a close neighbor. I and prisoner and another neighbor were selected to arbitrate a difficulty between Comer and a freedman, and prisoner, after consultation, agreed with us. My family visited prisoner's a few times, and have seen him frequently. The arbitration was in 1866. From my acquaintance and dealings I have always looked on prisoner as a sane man.

JAMES ROZIER testified: I knew the prisoner in Harris county in 1861 up to 1863; I was a neighbor, living within two miles; I and prisoner visited. From my acquaintance and dealings I think he has good common sense.

Cross-Examined: I knew his wife; I thought him a very kind man.

LOUIS ANTHONY testified: I am acquainted with prisoner, have known him five or six years; lived three-quarters of a mile from him. I never had much dealings with prisoner, only about thirty or forty cents; our families visited each other; I drove by prisoner's house in the morning before the killing took place; prisoner was sitting on the piazza; I said to him, "Good morning, Mr. Anderson, how are you getting on;" he replied, "I am no better, I am getting worse." I asked him how his wife was, and he said, "my wife is sick—my wife is sick," but I did not see his wife; I was studying about it, as to his sanity, and consider him sane. Witness was asked why he studied about his insanity, he replied he always had a reckless way about him, drunk or sober.

Cross-Examined: I think he came home on the Thursday before the killing; he seemed to be always restless.

JOHN LIGON testified: I have known the prisoner; I have known him since the latter part of 1863; I have had dealings with him; never visited his house; he generally traded with me when he came to town. From my dealings with him I should say that he was a sane man.

Cross-Examined: My opinion of his sanity is only from my dealings. He was pretty fond of his liquor, and sometimes got drunk, and was drunk sometimes when he traded with me.

J. L. ANTHONY testified: I married a step-daughter of prisoner; I was at prisoner's house shortly after the killing; I saw him about twenty-five minutes after the killing; I rode up on my horse; prisoner said to me, "Don't shoot me." I told him he deserved it; that is all that passed between us

that day; I was at his house the Saturday before the killing, I drove along the road, and he was ploughing in the field; I asked him the privilege of hauling some poles, and he said "Go on and haul them." I knew the prisoner about three years; I had been married about two years, was with prisoner's family a good deal; prisoner was a farmer, and conducted his business well when he tried; he drank whisky; he was peaceable even while drinking. From these facts and my acquaintance with him, I think he was a man of good sense. I know nothing of his quarrels with the Bachelor boys.

Cross-Examined: He came home about the middle of the week previous to the killing; he was sober when I spoke to him about the rails; I don't think there was any whisky in the house.

JOHN WOOLY testified: I have known the prisoner about three years; we lived within three hundred and fifty yards of each other; I have had several business transactions with prisoner; I saw him on Saturday and on Sunday morning before the killing. I did not speak to him either time, as I only saw him in passing along the road. From my acquaintance and dealings with him, I looked upon him as a man of good sound mind. I asked the prisoner after the killing when I came up, to give me his knife, and he refused to give it to me, saying that I was no friend of his; about an hour after the killing Mr. Whipple rode by in a buggy; prisoner called out to him to get him a Bible with large print.

Cross-Examined: I am the prosecutor in this case; am not related to any of the parties; I did say when asked about the witnesses in this case that I had my sheep trained; prisoner was in the habit of drinking a great deal. He had been drunk in Columbus two or three weeks before the killing. He was sober on Sunday morning before the killing.

DR. C. TERRY testified: I have heard the testimony in the case; I have practiced medicine for twenty years. From the testimony I have heard, I am of the opinion that he was not an insane man in the full meaning of the word at the

time of the killing; by an insane man I mean a man in the condition not to know right from wrong; from the abstinence from drink after the excessive drinking testified to, his mind was evidently in an unsound condition, as is frequently produced by abstinence after excessive drinking.

TESTIMONY IN SUR-REBUTTAL.

Dr. F. A. Stanford testified: I have heard the additional facts, and I have heard nothing in them to change my previously expressed opinion.

Dr. T. J. Word: I have heard the additional facts, and I have heard nothing in them to change my previously expressed opinion.

The charge of the Court does not appear by the record except as is stated hereafter. The jury found the defendant guilty. His counsel moved in arrest of judgment upon the grounds that the indictment was void because it was found true, after the adoption of the Constitution of 1868, by jurors not drawn under the provisions of that Constitution, *i. e.* from upright and intelligent citizens of the county, without distinction between the classes of persons who compose grand and petit jurors; the grand jurors were selected from such of the tax-payers of the county as, in the opinion of the Justices of the Inferior Court, with the sheriff and Clerk, were fit and proper persons to serve as grand jurors, as distinguished from those who were qualified to sit as petit jurors. In support of this they produced the minutes of May Term, 1868, by which it appeared that the jurors for November Term, 1868, were drawn under the old law, by which the distinction between grand and petit jurors was kept up. The motion in arrest was overruled.

Thereupon defendant's counsel moved for a new trial, upon the following grounds, the recitals of which are certified to be a true statement of what occurred on said trial:

1st. Because at the trial of said case the Court refused to allow counsel for defendant to ask Carlisle Terry, a physi-

cian, on his cross-examination, to express to the jury the structure of the brain, what changes were produced upon it by bodily disease, and how its inibation or inflammation was calculated to present to the mind unreal images, upon which a person with a diseased brain might be induced to act as though the imaginary impressions were real existences.

2d. Because the Court charged the jury that, if the condition of the defendant's mind was such that he could distinguish right from wrong, good from evil, and while in such condition he killed his wife, this would be murder, unless defendant reduced the crime by evidence which would show justification, or which would reduce the act to some degree of homicide lower than murder. The Court then explained to the jury the various degrees of homicide, manslaughter, etc., but refused to charge, though requested in writing by defendant's counsel so to do, as follows:

3d. If the jury believed some controlling disease was in truth the acting power within him, which he could not resist, and he had not a sufficient use of his reasons to control the passions which prompted the act complained of, he is not responsible, and again charged the jury, "that if the condition of defendant's mind was such that he could distinguish right from wrong, good from evil, and while in such condition he killed his wife, the law will hold him responsible."

4th. Because the Court refused to charge the jury, on the request of defendant's counsel in writing, "that they might find a verdict on the special plea of insanity, either for or against the plea, as they might find the fact; but did charge the jury that they must bring in a verdict of not guilty or guilty of such crime as they might find the prisoner to have committed under the indictment."

5th. Because the Court refused to charge the jury, on request of defendant's counsel in writing, "that the jury are judges of the law and facts, are not bound to take the law from the Court, if, having given the law so charged due weight and consideration, you cannot in your consciences bring your

judgment to accept the law as given to you in charge by the Court," but did charge them, "that they were judges of the law and the facts, so as to enable them to apply the law to the facts, and bring in a general verdict, but that they had no right to make law. The law was laid down in the Code. It was the province of the Court to construe the law and give it in charge, and of the jury to take the law as given, apply it to the facts as found by them, and bring in a general verdict."

6th. Because the jury found against the weight of evidence under the following charge given by the Court: "If upon the whole evidence given in the case, the jury entertain a reasonable doubt as to the sanity of the prisoner at the time of the commission of the alleged act, they are bound to acquit him."

9th. Because the Court refused, at the request of defendant's counsel, to allow the evidence to be read over to the witnesses, (the witnesses did not request the same) that they might correct any errors in taking it down, and frequently, during the trial, directed the Clerk not to take down the testimony in the language of the witnesses, but only its substance, and directed the Clerk from time to time, in the presence of the jury, what evidence to put down as material, and what to omit as immaterial, saying this is not for you, (the jury,) this evidence is for another purpose. "You must pay attention to what evidence the witnesses deliver from the stand." The Judge particularly remarked to the jury, "you must pay no attention to any directions to the Clerk, you have nothing to do with this; this is for another purpose. You must take the evidence from the witnesses. Endeavor to remember it all, and make your verdict on the evidence as given by the witnesses upon the same."

The Court refused a new trial, and sentenced the prisoner.

The case comes here upon errors assigned to the refusal to grant a new trial; to allow Dr. Terry to answer said question; to allow the evidence of the witnesses to be read over

to them respectively, and the directions given to the Clerk as to taking down the testimony; the several charges given and refused.

R. J. MOSES, L. F. GERRARD, for plaintiff in error, said indictment void: Art. 1, sec. 3, Const. 1868; Irwin's Code, sec. 4570; Art. V, Sec. 13, Const. 1868; Acts 1868, 128; Acts 1869, 139; 3d (Ga. R.) Kelly, 55; 1st, 631; 4th, 147; 1st Ch. Cr. L., 309. As to jurors being judges of law and fact: Erskin's speech; Dean of St. Asalph's case; Irwin's Code, secs. 4556, 3855; 3d Ga. R., 444; 16th, 603–4–5; 18th, 231; 22d, 484; 25th, 527; 30th, 383, 856. As to sound mind: 1 Russ on Cr., 12, 13, 14; 3 Kelly, (Ga. R.) 310; 31st, 424. As to drunkenness: 3 S. & M. R., 318. Ignorance of law, as it affects malice: 30th Ga. R., 383. As to the remarks by the Court: Act 1850; Cobb's N. Dig., 462; 12th Ga. R., 148; 38th, 73; 37th, 93; 40th, 391. As to practice under special plea of insanity: Irwin's Code, 4234, 4579; 1 Russ on Cr., 15, 17; Barrow's case; 1st Lewin, 238; Oxford's case, 38; E. C. L. R., 223. As to the verdict: Irwin's Code, section 3696; 7th Ga. R., 207.

H. L. BENNING, C. J. THORNTON, Solicitor General for the State, replied, the indictment was not void: Act of 1868, 127. Terry's reply was properly excluded: 1st Gr. Er., 440. As to the refusal to charge: 2d Parson's S. C. cases, 439; Code, sections 4234, 4522, 4231, 4579; 38th Ga. R., 507. As to jurors being judges of law: 40th Ga. R., Brown vs. State. The taking down of the evidence is in control of the Judge: Code, section 4599.

WARNER, J.

After a careful review of the evidence contained in the record of this case, as well as the several grounds of error alleged therein to the rulings of the Court on the trial thereof, we are unable to bring our minds to the conclusion that there

is any sufficient error, which under the law, would authorize this Court to reverse the judgment of the Court below in refusing to grant a new trial.

Let the judgment of the Court below be affirmed.

THADDEUS BRUNSON, plaintiff in error, *vs.* MIRABEAU SPARKS, defendant in error.

1. When a party borrows a horse from another, and while in the hands of his agent, the horse runs away and gets injured, from which, in a short time, he dies:

Held, That the manner of the injury, and the question of negligence therein, is one of fact for the jury, and where the verdict is not strongly and decidedly against the weight of the evidence, this Court will not disturb their finding.

2. When there is evidence either way to a material fact, as in case of bailment, as to what negligence has or has not been shown, and the jury have determined the question by finding a verdict:

Held, That the Court, under such circumstances, will not disturb it.

3. When the evidence shows that, through the act of an agent, either of two innocent parties must suffer:

Held, That the rule of law is, the party putting such agent forward shall be the party on whom the law puts the liability.

Motion for new trial. Before Judge JOHNSON. Muscogee Superior Court. May Term, 1870.

Sparks averred that he hired a horse to Brunson for a few days to plough, for reasonable reward, and that while Brunson so had him, he so carelessly and negligently managed him as to allow him to run away with the plough and thereby he was mortally wounded, to the damage of Sparks the value of the horse. Brunson pleaded not guilty.

That the horse was hired, was wounded, and died next day, and his value, was shown. For the plaintiff it was shown that a tenant of Brunson called at Brunson's request to borrow the horse, and said it was for Brunson, and that Brunson would pay for it; that he got the horse and gear,

ploughed him all day, and upon returning home, the horse turned out of the road, the tenant pulled the line, it broke and the horse ran away. This tenant said that he was not in fault, but that the matter was attributable to the worn line which Sparks had loaned, with which to work the horse.

The defendant testified that he did not know Sparks, had moved into the neighborhood only three days before, found said tenant on the premises, and consented that he should remain and cultivate a parcel of ground for half of its products, and that he suggested to the tenant to plough it, and the tenant went of his own accord and borrowed the horse, without any instructions from him. The jury found for the plaintiff the value of the horse. Defendant moved for a new trial upon the ground that the verdict was strongly and decidedly against the weight of the evidence. The Court refused a new trial, and that is assigned as error.

L. F. GERRARD, for plaintiff in error, cited secs. 398, 2071, 2000, 2062, 30, 34, 37, Rev. Code, and 19th Ga. R., 440, as to care used by bailees.

W. F. WILLIAMS and C. R. RUSSEL, by JAMES M. RUSSEL, for defendant.

LOCHRANE, C. J.

The question in this case comes before the Court from the refusal of the Court below to grant a new trial. Under the facts in this case the whole question for adjudication was fairly submitted to the jury, and there is sufficient evidence to sustain their verdict. And under the well established rules of this Court we will not disturb the judgment of the Court below in refusing a new trial, inasmuch as we are satisfied with the verdict of the jury.

Judgment affirmed.

Conner *vs.* The Southern Express Company.

MARTIN CONNER, plaintiff in error *vs.* THE SOUTHERN EXPRESS COMPANY, defendant in error.

An action at law does not abate by the bankruptcy of the plaintiff, and if the assignee in bankruptcy be discharged, without any interference by him with the suit, it may proceed in the name of the bankrupt, the presumption, in the absence of any proof to the contrary, being that the action is proceeding for the benefit of the true owner, whoever he may be.

Abatement. Bankruptcy. Before Judge JOHNSON. Muscogee Superior Court, May Term, 1870.

Conner brought case against said Company for the loss of his goods. When the cause was called for trial, defendant's counsel said plaintiff could not proceed because, *pendente lite*, Conner was adjudged a bankrupt. This was admitted, and plaintiff's counsel then proposed to make Conner's assignee in bankruptcy a party plaintiff. It was replied that he had been discharged and this was admitted; but the assignee was present and consented to be made a party. The Judge said the cause had abated, and refused to make the assignee a party. Conner's counsel then stated that they were interested, having a fee of fifty per cent. on the recovery, and proposed to have the cause proceed in Conner's name for their use. This was refused, nothing more appeared and the cause was held to have abated. These refusals and this holding are assigned as error.

H. L. BENNING, J. F. POU, PEABODY & BRANNON, for plaintiff in error.

MOSES & GERRARD for defendant in error, said party having legal interest must sue: Code, sec. 3192. If he be dead, suit abates, secs. 3375, 43, 18. Bankrupt Act, 1867, shows that assignee must act, and if one be discharged, another must be appointed. It could not proceed for attorney's benefit: 36th Ga. R., 630. Bankrupt is *civiliter mortuus:*

24th Ga. R., 494. Usee real party: Code, secs. 3437, 2848. Assignee must sue: 1 Ch. Pl., *25; 3 Bos. and Pul., 40; 3 B. and Ald., 697; 7 East, 53; Eden B. L. 244.

McCAY, J.

This is an anomalous case. Pending the proceedings in bankruptcy, and until the assignee was discharged, we are *not* clear that, under the Bankrupt law of the United States the bankrupt could proceed in his own name: United States Bankrupt Law, sections 18, 43, 16. Though it would seem that, by the English practice, where the rules of pleading too are very precise, the suit may proceed in the name of the bankrupt: 2 Wilson, 372; 3 T. R., 437; 7 East, 64; 1 T. R., 463; 1 B. and Adol., 459; 2 Daniel and L., 49; 3 Taunt, 59, and Peck *vs.* Jenniss, *et al.*, 7 Howard, 612.

But it appears that the proceedings in bankruptcy have been *concluded*, the whole matter settled and the assignee discharged. We must conclude that, for some proper reason, the title to this claim has reverted to the bankrupt. *Prima facie*, that is true, because the assignee has not undertaken to control it. It may have been left to the bankrupt *after* paying *all* his debts. It may have been allowed him as his poor debtors' exemption under the Bankrupt law. It may have been allowed to him on a composition with his creditors. as provided by the Act, even after the fiat of Bankruptcy, We do not assert as true, any of these things. The presumption is, that the judgment of the Bankrupt Court, *dicharging* the bankrupt and the assignee, closes up the business. If there was fraud, the fraud was in obtaining the discharge of the assignee, which will not be presumed, and cannot be set up by this defendant here. *Prima facie*, at least, this claim belongs to the plaintiff. The fact that there *has been* an assignee, and that he has been discharged, does not affect the question; since, as we have said, the *presumption* is that the

assignee, as the agent of the Bankrupt Court, would not have been discharged, leaving this claim undisposed of, had there not been some proper reason for leaving it in the control of the plaintiff.

Surely, the debt of the defendant was not discharged. There is no other person authorized to sue it, and it is but fair to presume that the plaintiff is now pressing it for purposes consistent with honesty, and for the use of whoever is entitled to the proceeds.

We think, therefore, the Court erred in holding that the suit abated until it is made to appear that the plaintiff is not the true owner, or is not asserting this right fairly; we think he had a perfect right to proceed, and it is not for the defendant to object.

Judgment reversed.

W. A. Ransom & Company, plaintiffs in error *vs.* Isaac Coleman, defendant in error.

[Lochrane, C. J., having been of counsel in the Court below, did not preside in this cause.]

A bill was filed against two. The answer of one defendant contained a cross-bill against the other. The bill was dismissed for want of equity. The cross-bill was amended and an order was taken that the other defendant be served with a copy, and that the cause, as between these defendants, stand for trial at the next term. The defendant in this cross-bill brought up the cause:

Held, That he was premature. R.

Writ of Error. Jurisdiction of Supreme Court.

Mrs. Coleman brought an action of divorce against Isaac Coleman. Pending this case Isaac Coleman made an assignment to W. A. Ransom & Company, and Mrs. Coleman filed her bill against them to set aside said assignment, and

praying for a Receiver. One was appointed, but had been discharged before this cause came on for trial. Ransom & Company and Isaac Coleman had answered the bill. Isaac Coleman's answer set up a cross-action against Ransom & Company, and also prayed that said assignment be set aside.

When the cause came on for trial, and the bill of Mrs. Coleman and the answer of Isaac Coleman were read, the Judge, upon his own motion, ordered both answers off the files. Then, upon motion of Isaac Coleman's counsel, the Court dismissed Mrs. Coleman's bill for want of equity, and ordered that their cross-bill be amended and served upon Ransom & Company's counsel. The bill was dismissed without objection. The last motion was granted over the objection of Ransom & Company. The Court ordered the Clerk to keep said answers in his office. Ransom & Company's counsel then asked the Court to tax the costs against Mrs. Coleman and Isaac Coleman. He said he would tax Isaac Coleman with no costs but that of amending his cross-bill. The Court then continued the cause thus made between Isaac Coleman and Ransom & Company, until the next term.

Mrs. Coleman did not except. Ransom & Company say that the Court erred in allowing Isaac Coleman's cross-bill to be amended and served, thus making a new cause, in continuing it, and in refusing to tax the costs as they wished.

When the cause was called here, counsel for defendant in error moved to dismiss the writ of error because it was premature; said that the parties must wait till something is done or sought to be done with the new case. The Court being of opinion it was prematurely here, the record was withdrawn.

CHAPPEL & RUSSELL, for plaintiffs in error.

BLANDFORD & THORNTON, GEO. S. THOMAS, by the REPORTER, for defendant.

WILLIAM PERRY *et al.*, plaintiffs in error *vs.* ROBERT M. GUNBY, defendant in error.

A case was brought up to the Supreme Court by writ of error, alleging certain specified grounds of error to the rulings and charge of the Court below, and refusal of the Court to charge as requested, and the writ of error was dismissed in this Court, on the ground that the original bill of exceptions and the record therein were not transmitted from the Court below within the time prescribed by the rule of this Court, and the judgment of the Court below was affirmed, as provided by the Constitution of this State. At the term of the Court at which the *remittitur* from this Court was made the judgment of the Court below, a motion was made for a new trial, on several grounds, under the provisions of the 3670th section of the Code, which motion was overruled on the ground that the dismissal and affirmance of the judgment of the Court below, was a bar to the granting of a new trial:

Held, That the defendant was not concluded from making a motion for a new trial on any legal or equitable grounds, except those specified grounds of error taken in the bill of exceptions which was dismissed; as to each of those grounds he was concluded, by the affirmance of the judgment, under the provisions of the Constitution, but not as to other grounds not contained in the bill of exceptions which was dismissed.

Res Adjudicata. New Trial. Practice. Before Judge JOHNSON. Muscogee Superior Court. May Adjourned Term, 1870.

This cause was brought before this Court at June Term, 1870, without any motion for a new trial having been made in the Court below. On the 13th of June, 1870, because the record had not been transmitted to this Court in the time required by law, (and because no sufficient excuse or explanation for the delay was shown,) the Court dismissed the writ of error, and ordered "that the judgment of the Court below stand affirmed." See 41st Georgia Reports. In the order dismissing it and in the *remittitur*, the words in brackets are wanting. The May Term of said Superior Court had been adjourned, and was in session in July, 1870. The defendant's counsel then moved for a new trial in said cause,

upon all the grounds stated in the said dismissed bill of exceptions, and also upon the grounds that said verdict was contrary to law and equity, and to the weight of the evidence, and produced the *remittitur* to show that the dismissal was the fault of the Clerk below. Complainant's counsel said that said judgment of affirmance was a bar to any motion for a new trial in said cause, and upon that ground the Court refused to entertain the motion. That is assigned as error.

When the cause was called here, counsel for Gunby moved to dismiss it, because by the first cause this was *res adjudicata*. The Court ordered the cause to proceed, saying they could only pass upon this motion upon full hearing. But the argument was confined to the question whether such affirmance was a bar to a motion for a new trial; this Court would not hear argument upon the merits of the motion.

CHAPPELL & RUSSELL; R. J. MOSES, Jr., for plaintiff in error.

H. L. BENNING, for defendant.

WARNER, J.

The defendant was not concluded from making a motion for a new trial, under the provisions of the 3670th section of the Code, on any legal or equitable ground, except the specified grounds of error taken and set forth in the bill of exceptions, which was dismissed in this Court. As to each of those grounds of error, he was concluded by the affirmance of the judgment, under the provisions of the Constitution, but not as to other grounds not embraced in the bill of exceptions, which was dismissed.

Let the judgment of the Court below be reversed.

Jeter *vs.* Barnard & Company.

MORTIMER JETER, administrator, plaintiff in error *vs.* E. BARNARD & COMPANY *et al.*, defendants in error.

A bill in equity to marshal the assets of an estate, filed by an administrator, setting forth that the estate cannot pay all the claims upon it, that there are various creditors claiming preference in the distribution, (which claims are set forth in detail) and that other creditors dispute this priority, is properly filed, and is not demurrable for want of equity.

Equity. Administrator. Bill for Direction. Before Judge JOHNSON. Talbot Superior Court. September Term, 1870.

The following facts appear by the bill and amendments of Jeter, as administrator of Copeland: In 1860 Copeland died, intestate, leaving a large estate. The widow administered, but her letters abated by her marrying. One Gamble became administrator *de bonis non.* The widow's second husband died, and she married Jeter in 1864. Gamble resigned, and Jeter became administrator, *de bonis non*, according to law.

The estate turned over to him by Gamble was a plantation and slaves, and the usual appurtenances of a farm, stock, etc. All the balance had been administered. Jeter worked the plantation for a year, hoping to raise a good crop and relieve the estate from embarrassment, but the seasons were bad, and when he filed the bill he anticipated a poor crop. The estate was appraised, in 1865, after emancipation of slavery, at $7,026 50. Intestate's estate owes at least $5,000, perhaps more. (The debts are specifically set out.) One Perryman claims a vendor's lien on said land for $1,500 00. Several judgments are liens on the land and debts; others are sued upon, and there are other demands not in suit. The complainant's wife has had her dower assigned out of said plantation, including the dwelling, and leaving but about five hundred acres of land, without buildings on them. She also claims that the estate owes her largely for commissions due her as such administratrix. Besides, while administra-

trix, she settled various claims against Copeland's estate by giving her notes, and did not claim them as payments in her returns. If she has these notes to pay she will claim that the estate shall repay her. Besides, these creditors gave no receipts, and may hold the estate bound.

Copeland left four children, three of them are minors, the other is an adult, but a lunatic. These children, by their next friend, have applied for a homestead in the lands not assigned as dower, and this application is now pending on the appeal. To defend all these claims will be expensive, troublesome and dangerous to the administrator.

The prayer was that the creditors be enjoined till the respective debts could be more fully ascertained and classified, with a view of marshaling said assets, that a master be appointed to examine them, and for direction and general relief.

Upon motion of a creditor this bill was dismissed for want of equity. That is assigned as error.

B. HILL, E. H. WORRILL, for plaintiff in error.

INGRAM & CRAWFORD, for defendants.

McCAY, J.

We do not see why the case made by this bill does not come entirely within the provision of section 3089 of the Revised Code. Here is an insolvent estate. Here are various creditors with conflicting claims, and the true amount due any one of them cannot be conclusively settled without settling, also, the claims of the others. It is replied, that this can be done at law; that the administrator may plead *plene administravit*, or *plene administravit præter*, and, under our law, may plead any fact, and that the jury may give such a verdict as will protect him.

In ordinary cases, this is true. As to the *amount* of any debts against the estate, the judgment of a Court will pro-

tect the administrator, but as to the *dignity* of any particular claim, as compared with other debts, the judgment, at law, would not bind the claiming creditor unless he were a party to the suit. The administrator might plead, for instance, in defense of any particular debt, that he had no assets, except such as were necessary to pay debts of higher dignity. On the trial, it might be found that certain claims which he set up in his plea, as of higher dignity than that of plaintiff's debt, then in suit, were not of higher dignity, and judgment might go against the administrator, charging him with the assets to pay the pending claim. But the outside creditor, not being a party, would not be bound by this judgment, and might still assert his claim against the administrator as of the highest dignity, and, perhaps, succeed, and thus the administrator be rendered unjustly liable to pay out more than he ever had, since the judgments would be both conclusive of assets.

We are clear, therefore, that, in cases of conflicting claims, especially if the contest be as to the relative *dignity* of the claims, it is very proper to bring all the parties before the Court.

In England, Courts of Equity assume jurisdiction in every case of an insolvent estate, and the administration of assets, of intestates' estates, in their largest branch of business: Roberts on Equity, 138; Hargroves on Equity, 29, 95, 107. Our more liberal rules of pleading at law do not require the interference of equity in many cases which, in England, would be clearly within the jurisdiction of Chancery.

But the case of conflicting claims and an insolvent estate is, in our judgment, clear, and we reverse the judgment.

Judgment reversed.

Cohen *vs.* Meyers, Cohen & Company *et al.*

ADOLPH COHEN, plaintiff in error, *vs.* MEYERS, COHEN & COMPANY *et al.*, defendants in error.

1. A bill by creditors charging that the debtor, who is insolvent, has fradulently transferred his property, a stock of dry goods, to a third person who is in complicity with the fraud, and who is rapidly selling them at retail to other persons, and praying the appointment of a Receiver, is not demurrable, on the ground that the complainants do not show that they have sued their claims to judgment at law.
2. In a motion to revoke an order appointing a Receiver, on the ground that the answer of the defendants, with the supplemental affidavits, "swears off" the equity of the bill, the Chancellor is authorized by law to grant or refuse the motion, according to his discretion, under all the facts and circumstances of the case, and this Court will not control his judgment unless his discretion has been abused.
3. If affidavits used on the hearing of an equity cause are part of the record they need not be copied in the bill of exceptions. (R. See end of report.)

Equity. Receiver. Bill of Exceptions. Before Judge CLARK. Chambers, Macon county, October, 1870.

Einstein & Eckman, and others, filed a bill containing the following averments: Barnard Golinski, of Albany, a trader, owes Einstein & Eckman, Robert Zacharias, and Meyer, Cohen & Company specified sums of money on drafts due respectively on the 19th, 1st and 18th of October, 1870. These drafts were given for goods bought by said Golinski from said respective parties. Golinski took the goods to Albany and put them into his store where he was doing business. All Golinski's goods have been, by him, removed from Albany to Montezuma and there taken possession of by Adolph Cohen, who is selling them out as his own. Golinski and Adolph Cohen made said transfer of the goods avowedly, on the part of both, to defraud these complainants and other creditors of Golinski. Golinski and Adolph Cohen are insolvent.

They prayed that the pretended sale to Cohen be set aside, and that meanwhile a Receiver take charge of said goods, with a view of securing the payment of said drafts and other de-

mands against Golinski for all creditors who may become parties complainants. The Chancellor, Judge Cole, on the 20th of October, 1870, ordered the sheriff to seize the goods and turn them over to a Receiver appointed in the order. This was done on the next day.

Cohen answered, that on the 5th of September, 1870, he bought from Golinski, certain goods at $4,745 88, and on the 13th of September, 1870, certain others at $199 00; that at each purchase he paid the amounts respectively aforesaid in cash; that these purchases were made in a due course of trade, *bona fide*, without any intention to defraud Golinski's creditors. Indeed he said he did not know that Golinski owed complainants till he saw this bill. He said that he bought of Golinski because he offered the goods as low as they could be bought in New York; that he was selling them in his own store, in due course of trade, at Montezuma, and putting the proceeds into other goods to keep up his stock; that he owed nobody anything and had done nor said anything inconsistent with *bona fides* in the premises.

Golinski answered as Cohen had, and said, further, that he sent the money received from Cohen, per express, to A. S. Joffer, his brother-in-law, at New York, per express, to pay his debts; said drafts were drawn on said Joffer, who was his security; and said money, $5,000 00, so sent, was stolen from Joffer. He denied all fraud and combination, and said he might have told Cohen he would make a sacrifice on the goods to keep up his credit, but told him no more as to his indebtedness. He admitted his insolvency, but said it was due to the loss of said $5,000 00.

Upon the filing of these answers, defendants moved, before Judge Clark, to have said Receiver discharged and said goods restored to Adolph Cohen. Jacob Cohen made affidavit that Golinski boasted to him that he had gotten ahead of his creditors by this sale to Adolph Cohen, and said that he, Golinski, was still interested in the stock; and that he had heard different parties say that Adolph Cohen had boasted

that he did not buy goods in New York because he expected to buy Golinski's goods, who would sell cheaply because he did not intend to pay his debts. (All this was denied in the said answers). On behalf of defendants, three persons, two of them clerks of Golinski's, made affidavits that said purchase was in the usual course of trade, and that Adolph Cohen paid said cash as stated in his answer. One added that he knew that Golinski had no interest in the goods after Adolph Cohen bought them.

The grounds for the motion were, that the application being *ex parte*, and no bond having been given, the Chancellor ought not to have appointed the Receiver; and now should discharge him because the equity of the bill was sworn off by the answers and affidavits.

The Chancellor required complainants to give a bond, (for what or to whom does not appear), and then refused to discharge the Receiver, until Adolph Cohen would file a bond, with good security, in the sum of $2,000 00, conditioned to pay whatever decree complainants might recover against him in this cause. This is assigned as error.

When the cause was called here, counsel for defendants in error moved to dismiss it, because the affidavits on behalf of the defendants were not copied into the bill of exceptions. The bill of exceptions said, "upon the coming in of the answers of defendants and affidavits of the other parties, a copy of which affidavits are hereto attached, marked exhibits B, C and D," the motion, etc. After the usual certificate of the Judge to the bill of exceptions, follow these three affidavits. But there is no mark of identification on either. The usual certificate of the Clerk comes after these affidavits. The affidavits for the complainants were attached to the bill, and come up as part of the certified record. But no allusion is made, in the record, to these affidavits for defendants, except this: The Judge said in his order, "after consideration of all the facts set forth in the bill, answers and affidavits" ordered, etc. The motion was overruled, because the affidavits were [redacted]part of the record.

MORGAN & MCCARTHY; LANIER & ANDERSON, for plaintiffs in error.

NESBITS & JACKSON, for defendants.

MCCAY, J.

It is well settled in this Court, that the judgment of the Court below, in a proceeding of this character, will not be interfered with, hastily. The Code, section 3150, expressly places these interlocutory proceedings in the discretion of the Circuit Judge, and this Court will, in its review of his actions, give great respect to his opinion upon the facts.

As a matter of course, if there be no equity in the bill, if the Court has no jurisdiction of the case, that is another matter. But it is a mistake to suppose that, if the answer, in terms, denies the charges in the bill, the Judge is required, by law, to revoke his order granted *ex parte*. He is to take the whole case, to consider the credibility of the answer, its consistency with itself, and with the nature of the case; and if, on the whole, it appear that justice requires things to remain in *statu quo* until a jury can pass upon the case, the order ought to stand.

We cannot help feeling that the Judge, in this case, is about right. The admitted facts are suspicious, and we think the answer only makes them more so. It is a little odd that such a purchase should have been made, and the loss of this money, as stated in the answer, with such ready means at hand to prove it, if true, does not, in our judgment, look exactly natural, and worthy of full belief. We can easily see how the Judge should feel that this matter ought to be passed upon by a jury, and that justice requires the property to be kept safe until the hearing.

We are not perfectly satisfied that this is a case not falling within the rule that a general creditor cannot ask the preventive aid of a Court of Equity before he gets a judgment at law. But there are facts stated and charged in the bill

which, if true, give *these* creditors a peculiar equity. It is charged that Golinski *bought* these goods, with *intent* to *defraud* the complainants, that he never *intended* to pay for them, and that Cohen *knew* of *this*, and acted upon it, with the avowed purpose of making money out of the transaction. If he was in complicity with Cohen before he bought the goods, or if Cohen knew, when *he* bought, that Golinski had this intent, this case would be entirely out of the rule to which we have referred. Then these goods never, in equity, belonged to Golinski; he *obtained* them by fraud, and with a fraudulent intent, and the jurisdiction of a Court of Equity is complete.

We think there is enough charged in this bill to justify this, and that the whole case ought to go on for a hearing on its merits.

Judgment affirmed.

ISAAC CHENEY, plaintiff in error, *vs.* SMITH & ALEXANDER, defendants in error.

When a motion is made to continue a case for the purpose of procuring testimony, the Court may require the showing to be reduced to writing and sworn to by the party moving the continuance; but if the opposite party will admit and does not contest the truth of the facts expected to be proved, the continuance should not be allowed. But it is error for the Court to overrule the motion for a continuance on the ground, that the opposite party will simply admit the facts expected to be proved, and then allow such opposite party to contest the truth of the facts admitted. To avoid the continuance of a case for the purpose of procuring testimony upon a proper showing made therefor, under the 3472d section of the Code, the opposite party must admit, in writing, the facts expected to be proved, and agree that he does not *contest the truth thereof.*

Continuance. Practice. Before Judge JOHNSON. Talbot Superior Court. May Term, 1870.

Cheney *vs.* Smith & Alexander.

Smith & Alexander brought against Cheney complaint upon an open account for $500 00, for "retainer and services rendered for him by them, as attorneys and counselors at law, in the matter of the exchange of his stock in the Upson County Railroad Company for stock in the Southwestern Railroad Company." The plea was the general issue.

When the cause was called for trial, defendant moved to continue, because one Mustian, a director of the Southwestern Railroad Company, was a material witness by whom he could show that, in fact, the Southwestern Railroad Company never intended repudiating their promise to give him its stock for his interest in said Upson County Railroad Company, but always, *bona fide*, intended carrying it out. The showing was in due form, etc. Plaintiffs' counsel said he would admit "what Cheney had stated he could prove by Mustian, and go to trial." To this, defendant's counsel replied, "I suppose you will not controvert what Cheney has stated he expects to prove by Mustian." The Court said he "would not hold plaintiffs' counsel to that rule, but, if he would admit that Mustian, if examined as a witness in the case, would swear to what Cheney had stated, he would overrule the motion to continue." Plaintiffs' counsel said he would so admit it. The Court then required defendant's counsel to reduce said statement to writing and make an affidavit to it. This was done, defendant's counsel objecting to the requiring said affidavit. When it was prepared, plaintiffs' counsel wrote upon it the admission required by the Court as aforesaid, and the cause went to trial, defendant objecting.

Said Smith testified that Cheney came to plaintiffs' office, represented that the Southwestern Railroad Company were not going to stand up to an agreement which they had made with him to exchange a large amount of its stock for defendant's interest in the Upson County Railroad Company, and wished plaintiffs to sue the Southwestern Railroad Company therein. Smith, upon hearing Cheney's statement, advised him that the agreement could not be enforced, because it was

voluntary and without consideration. In a week or ten days, Cheney urged plaintiffs to take his case and bring suit; said he would not leave until they would agree to do so, and that he would pay them to their satisfaction. Smith agreed to take charge of the business and do what he could to get the Southwestern Railroad Company to do what they had promised. He and his partner wrote twice to the President of the Southwestern Railroad Company, urging the execution of the agreement; frequently conversed with Mustian on the subject; saw the President and had a long conversation with him on the subject; he did all he could for Cheney and, in one way and another, did a gread deal for him. Without suit, B. Hill, Esq., and plaintiffs, succeeded in getting $10,000 00 of Upson County Railroad Company's stock, not worth over forty cents in the dollar, converted into Southwestern Railroad Company's stock, at par, and afterwards Cheney expressed himself perfectly satisfied with their services, and said he would pay them to their satisfaction. He said he thought plaintiffs were justly entitled to $500 00 for said services. B. Hill, Esq., testified that Cheney had told him that he was well pleased with what Smith had done for him, and that the services stated by Smith were worth $500 00. He said he had also sued Cheney for his fee in the matter, and stated what *he* had done in procuring said exchange. Colonel Ramsey testified that, from Smith's statement, $500 00 was a reasonable fee in the matter. Here plaintiffs rested.

Defendant testified that, after the agreement to exchange, he was induced, by a conversation of one Flewellen, to believe the Southwestern Railroad Company would not carry it out, and went to plaintiffs and told them if he had to sue he wished them to bring the suit; that his interest in the Upson County Railroad Company was worth as much as the stock received in exchange. The statement of what Mustian was expected to testify was then read in evidence. Defendant also read in evidence the testimony of other attorneys as

to the value of plaintiffs' services. Upon the hypothetical case made in the interrogatories, the witnesses put the value of the services at from $200 00 to $500 00, according as it was stated by defendant or plaintiffs. The verdict was for $500 00 for plaintiffs.

Defendant's counsel say the Court erred in not continuing said cause; in requiring the said statement; when reduced to writing, to be verified by affidavit, and in allowing plaintiffs' counsel to force him to trial without agreeing not to contest the truth of what Mustian was expected to testify.

E. H. WORRILL, J. M. MATTHEWS, for plaintiff in error.

M. H. BLANFORD, for defendants.

WARNER, J.

The Court below erred in overruling the defendant's motion for a continuance of the case, on the ground, that the opposite party was willing to admit the facts expected to be proved by the absent witness, and then allowing the plaintiff to *contest* the truth of the facts admitted, on the trial of the case, under the provisions of the 3472d section of the Code.

Let the judgment of the Court below be reversed.

WENDELL LEVY, plaintiff in error, *vs.* LUCILLE C. SIMMONS, defendant in error.

Where the evidence of the plaintiff in the action, is insufficient, in law, to entitle him to recover, the defendant may demur thereto, and demand of the Court a judgment of non-suit; but, if the demurrer to the evidence is overruled by the Court, then the defendant, according to the long and well settled practice of the Courts of this State, may go before the jury and contest the plaintiff's right to recover, by the introduction of evidence in his own favor. The overruling the defendant's demurrer to the plaintiff's evidence has never been held by the

Courts of this State, since the adoption of the Judiciary Act of 1799, to be *conclusive* as to the plaintiff's right to recover the money or property sued for.

Trover. Non-suit. Demurrer. Practice. Before Judge JOHNSON. Taylor Superior Court, October Term, 1870.

This was trover for a horse, by Simmons, against Levy. The pleas were the general issue, and that Levy had bought the horse from Simmons' agent. At the trial, there was no contest as to demand, or as to the value of the horse, nor as to plaintiff's having owned the horse. But the whole dispute was as to whether Levy had bought the horse from plaintiff. It was shown, by three witnesses, that one Davis had the horse; Levy agreed to buy it, at $200 00, to be paid in a few days; that he was to leave the money with one Sharp for plaintiff, and then go to Davis and get the horse; that he did not pay the money, but went to Davis, who had no authority to sell or swap the horse, and with him swapped another horse for plaintiff's; that Davis was insolvent, Levy knew it, and had been expressly told not to pay the money to Davis, and plaintiff never received any part of said $200 00, or other pay, for her horse.

Here the plaintiff closed. Defendant moved for a non-suit, but it was refused. And thereupon defendant demurred to the evidence of plaintiff, which demurrer was joined in by plaintiff, and the Court, then and there, gave judgment for the plaintiff. The Court then referred said case to the jury to ascertain plaintiff's damages. And thereupon defendant offered to prove, before the Court and jury, that the horse was defendant's. The Court refused to allow this evidence, remarking that the judgment on the demurrer concluded defendant, and that he would allow no proof, except as to the amount of damages which plaintiff had sustained. Plaintiff had a verdict for the value of the horse and hire.

The refusal of the non-suit and refusal to hear defendant's evidence as to his title, after judgment on the demurrer, are assigned as error.

HOLSEY & COLBERT; M. BLANDFORD, for plaintiff in error.

WALLACE & ROSS; R. J. MOSES, for defendant, cited, as to the demurrer: 3 Blackstone's Com., 372. And said joinder in demurrer was agreeing to leave the matter to the Judge: 13th Ga. R., 159, 229; 29th Georgia Reports, 696; Dudley, 209.

WARNER, J.

This was an action brought to recover the possession of a horse, and upon the trial thereof, after the plaintiff had closed his evidence, the defendant made a motion for a non-suit, which the Court overruled, and the defendant excepted. The defendant then demurred to the plaintiff's evidence, and there was a joinder in the demurrer by the plaintiff, and the Court, upon the hearing thereof, gave judgment for the plaintiff, to which the defendant excepted. The Court then referred the case to the jury to ascertain the plaintiff's damages, and thereupon the defendant offered to prove, before the Court and jury, that the horse in controversy was the property of the defendant, which the Court refused to allow him to do, on the ground, that he was *concluded* by the judgment on the demurrer, and said that no proof would be allowed before the jury, except as to the amount of damages the plaintiff had sustained. Whereupon, the defendant excepted. The motion for a non-suit was properly overruled by the Court, as there was sufficient evidence of the plaintiff's legal right to recover the horse to be submitted to the jury, but if there had been no evidence which, in law, would have entitled the plaintiff to recover, then the non-suit should have been allowed by the Court.

A demurrer to evidence is not special pleading. Under the provisions of the common law, and the practice of the Courts in England, when the defendant demurred to the

whole evidence, and the Court overruled the demurrer, the judgment of the Court on the legal right of the plaintiff to recover the property sued for, was conclusive on that point, and the defendant could not contest the legal right of the plaintiff to recover before the jury. But in this State, a different rule has prevailed ever since the enactment of the Judiciary Act of 1799. The practice in the Courts of this State has uniformly been, whenever the plaintiff's evidence was considered by the defendant to be insufficient, in law, to entitle him to recover, to demur thereto, and to move the Court for a non-suit; and if, in the opinion of the Court, there was any evidence which ought, properly, to be submitted to the jury for their consideration, to overrule the demurrer, and refuse the motion for non-suit. But the overruling the demurrer to the evidence and refusing the motion for a non-suit has never been held to *conclude* the defendant from going before the jury and insisting upon his rights there, as he might be enabled to establish the same by evidence which he might introduce for that purpose. In other words, overruling the motion for a non-suit upon a demurrer to the plaintiff's evidence, has never been held by the Courts of this State as *conclusive* upon the right claimed, so as to prevent the defendant from contesting it by evidence before the jury. The contemporaneous construction given to the Judiciary Act of 1799, by the Courts of this State, has uniformly been, that when the plaintiff made out a *prima facie* case by his evidence, he was entitled to go before the jury, and to have them decide upon that evidence, and that, although defendant may have demurred to that evidence as being insufficient, in law, to entitle the plaintiff to recover, and moved the Court to non-suit the plaintiff in consequence thereof, the overruling the defendant's motion would not have the effect to *conclude* the defendant from going before the jury and contesting the legal right of the plaintiff to recover by the introduction of evidence, in his behalf, for that purpose. This practice has been so long recognized, and so

thoroughly established by the decisions of the Courts of this State, that we are unwilling to disturb it, and we, therefore, reverse the judgment of the Court below in this case.

Judgment reversed.

JOHN H. PATE, plaintiff in error, *vs.* O. A. LOCHRANE, trustee, defendant in error.

(LOCHRANE, C. J., did not preside in this cause.)

When there was a trust-estate for a woman and her children, and by the terms of the trust the husband was entitled to the annual income for the support of himself and family, without account, and an action was brought, at law, to make the trust-estate liable for necessaries furnished the beneficiaries and the trust-estate, and it appeared that the husband, owning a plantation side by side with the other, worked them together as one place, and, during the year, supplies were furnished him and goods sold to the hands on orders from him, as an advance on their part of the crop, and the share of the hands was, at the end of the year, to the extent of these advances, retained and sold with the general crop, and the jury found for the plaintiff the full amount claimed:

Held, That there was no error in the Court, in granting a new trial, on the ground that the jury found contrary to the evidence.

New Trial. Trust-Estates. Before Judge COLE. Bibb Superior Court. April Term, 1870.

Pate sued Lochrane, as trustee for Mrs. Mary F. Lamar, wife of L. M. Lamar, upon an open account for $477 04 for goods, wares and merchandize, averred to have been furnished to Mrs. Lamar and family and to laborers engaged in working for said trust-estate upon her plantation therein described. About $100 00 worth of the items, and the first charged, are such as a lady and family would use; the balance was mainly for goods sold to laborers. The defense was that the trust-estate was not liable.

The plaintiff showed that Lamar told plaintiff that Mrs.

Lamar wished about $75 00 worth of goods, and wished plaintiff to let her have them, saying that when the cotton on said plantation where he, Lamar, and his family resided, was sold, he would pay the amount. She came and bought the goods. Afterwards during the year, upon Lamar's order, the other goods were furnished to him and said laborers. It was shown that the plantation was Mrs. Lamar's, and that it was worked, in 1867, by Lamar as hers, and that Lamar was now a bankrupt.

The defendant read as evidence an ante-nuptial contract between Lamar and his wife, by which her property was conveyed to a trustee for her benefit, with certain remainders, etc., immaterial here, by which Lamar's interest and control of the property was specified, as follows: "To be in no wise subject to the present or any future debts or liabilities of the said Lucius M., but it is the true intent and meaning of these presents that the said Lucius M. shall have the control and management of said property herein conveyed, so far as the rents, issues and profits of the same, during the continuance of the coverture, for the proper support and maintenance of himself, said Mary Francis, or any child or children which may be born to them, and without other accountability for said rents, issues and profits during said coverture."

L. M. Lamar testified that in 1867 he controlled the plantation in Pulaski county, known as the Lamar place, containing over three thousand acres of land, fifteen hundred acres of which was his and the balance belonged to said trust-estate; that the whole was worked together without regard to which was his and which was the trust-estate's; no goods were bought from plaintiff for the use of the plantation or trust-estate except those sold to the family for its use. The plantation supplies were obtained from Lathrop & Company, of Savannah, by him as agent of the trust-estate, by direction of the trustee, and a lien was given upon the whole crop to pay for them. The goods obtained by the laborers from plaintiff was for their own use. He arranged with plaintiff

to furnish goods to the laborers on the plantation, promising to deliver to plaintiff the cotton which should fall to the share of the laborers to pay the debt. And he did deliver, to the warehouse, the cotton to pay what the laborers owed plaintiff, but cotton fell to such a low price, he, Lamar, was compelled to send the cotton to Savannah to pay Lathrop & Company. He made this arrangement with plaintiff for the benefit of the laborers, not for the benefit of the trust-estate. The proceeds of the cotton were applied to paying Lathrop & Company for plantation supplies. He acted as agent of the trustee in managing and cultivating said plantation in 1867. When he settled with the laborers he charged them with the goods charged in plaintiff's said account, as bought by them, and the laborers allowed the same in the settlement. This settlement was in 1868.

Defendant's counsel requested the Court to charge the jury, that if the cotton was under a prior lien to Lathrop & Company, the fact that this cotton was turned over to Lathrop & Company to pay the plantation debt, does not make the trust-estate liable to plaintiff. He refused so to charge, but charged, that these facts might render the trust-estate liable. He further charged, that if, at the time the account was contracted, Lamar had an individual farm upon which said laborers were also employed, and this contract was an individual contract on the part of Lamar, the laborers and the plaintiff, Lamar, is liable, (and the trust-estate is not, unless it received the exclusive benefit of the same.) The record is indistinct, and the words in ( ) are written as what is supposed to be meant by it.

The jury found for the plaintiff for the full sum sued for, and judgment was entered against said trust-estate. Defendant's counsel moved for a new trial, upon the grounds, that the Court erred in refusing to charge as requested, and in charging as he did, and because the verdict is contrary to law. The Court granted a new trial, upon the ground, that the verdict was contrary to the law and evidence. This is assigned as error.

LANIER & ANDERSON, for plaintiff in error.

A. O. BACON, for defendant.

McCAY, J.

We do not think the question, which has been so elaborately argued, fairly arises in this case. Admitting that the estate of a *cestui que trust* is liable for necessaries furnished either to the estate or to the beneficiaries, we do not think the facts of this record make out the condition required.

These goods were furnished to the husband, and for his *own* use. By the terms of the trust, he was to be without liability to account, and he was clearly carrying on this trust plantation in common with his own. Who furnished the mules, the provisions, the tools, the seed, and footed the general expenses of the enterprise? How many acres of the whole planted belonged to the trust-estate, and what portion of the proceeds? All these questions must be solved before a jury could say that the trust-property should bear the burden of this particular debt. The enterprise of the husband in planting was in a common planting of both his own individual place, and of the land belonging to the trust. This account was contracted to pay the laborers who worked for the husband, in this enterprise, upon the common land.

It is true, the evidence shows that cotton, belonging to the negroes, sufficient to pay their advances, was left with Mr. Lamar, and the proceeds of the sale of it went to his credit. But Mr. Lamar was not the owner of this trust property, and it is one thing to pay money to him, and another to pay it to the use of these beneficiaries. Perhaps a Court of Equity, after a complete investigation of the affairs of this planting enterprise, and after ascertaining just what interest the trust-estate had in it, and a full account of how much it had expended and received, might decree that a proportionate share of this account should be paid out of the trust-property, but so far as this evidence shows, and so far as any

Court of law can investigate the matter, we do not see how, in justice, the trust-estate shall be made liable to pay it, even under our very liberal rules for proceeding, at law, against trustees and trust property.

Judgment affirmed.

R. T. COLEY *et al.*, plaintiffs in error, *vs.* JOHN HENRY, executor, defendant in error.

A suit was instituted on a promissory note in favor of H., as the executor of S., against R. T. Coley and V. A. Coley and Westbrook as security, dated November 1, 1866, which purported on its face, to be in renewal of a note given by the Coleys to Westbrook for a tract of land, and the defendants filed a plea in which they alleged that the defendant, Westbrook, on the 13th day of December, 1859, purchased a tract of land of Smith, the plaintiff's testator, and executed his note therefore to S. for the sum of $10,000 00, and afterward, on the 14th of December, sold the same to the Coleys for the sum of $12,000 00, taking their notes for the purchase-money; that the defendant, W., prior to the 1st of November, 1866, had paid of the original consideration for the land the sum of $5,000 00, and that on the day and year last aforesaid, the Coleys, with Westbrook as security, renewed said note for the balance due for the land, and gave it to the plaintiff, which is the note now sued on. The defendants also plead loss of property sustained by the war under the provisions of the Relief Act of 1868, and offered to surrender back the land to plaintiff, and to rescind the contract upon his accounting for the improvements made thereon, and the purchase-money already paid therefor. The plaintiff demurred to the defendant's plea, which was sustained by the Court.

Held, That inasmuch as the defendant's plea did not set forth any equitable grounds of defense to the plaintiff's action by connecting the plaintiffs, or his testator, in any way with the loss of their property, the demurrer to the defendant's plea was properly sustained by the Court below.

The defendants also moved the Court to suspend the trial of the case under the resolution of the General Assembly, in the year 1870, suspending the proceedings of the several Courts of this State on debts and contracts made prior to the 1st of June, 1865, which motion to suspend the trial the Court overruled:

Held, That the resolution of the General Assembly was not a law bind-

ing on the Court, and that there was no error in the Court below, in overruling the motion to suspend the trial.

Constitutional Law. Relief. Before Judge COLE. Dooly Superior Court. April Term, 1871.

John Henry, as executor of Matthew Henry, sued said Coley and others, upon their joint and several promissory note for $7,429 03, made the 1st of November, 1866, due twelve months after date, in which it was recited that said note was in "renewal of the original note for purchase of the Smith plantation in the Third District of Dooly county, Georgia."

The defendants pleaded the general issue; that on the 13th of December, 1859, said Smith sold Westbrooks (one of said defendants) said land for $10,000 00, on the next day Westbrooks sold it to the other defendants for $12,000 00, both of said sales being on credit, and said other defendants and Westbrooks gave Smith their note for $10,000 00; before November, 1866, defendants paid about $5,000 00 on said note, and on the 1st of November, 1866, they gave the note sued on in renewal of said old note; that when they made the original contract they were worth $50,000 00, $40,000 00 of which was lost by the results of the war, and the annual income from said plantation has been of very little value, not more, after defraying expenses, than $....., that they have made on said plantation divers improvements, worth $....., and they offered to adjust said claim with the plaintiff in accordance with the provisions of the Relief Act of 1868. And they offered to surrender the plantation and account for the rents and profits, and receive credit for the improvements, and thereby rescind said purchase from Smith.

On the 4th of April, 1870, the cause was called for trial, when the defendants' counsel moved to suspend the cause because of the Stay-resolution of the 17th of February, 1870, (which see in 40th Georgia Reports, 665, and in Martin *vs.* Huson, post) and proposed to show, in addition to the facts

pleaded with regard to said note, that the note sued on was given with the express understanding that it was liable to all the defenses to which the original note was liable. The Court ordered the cause to proceed.

Plaintiff's counsel demurred to said relief pleas, because they in no way connected plaintiff or his testator with said losses, and because they showed that this note was not a renewal of the old one, but a novation. The demurrer was sustained on the first ground. Plaintiff's counsel read the note in evidence, and there being nothing else before the jury, they gave a verdict for the amount of the note sued on.

The refusal to postpone the cause, and the sustaining of said demurrer, are assigned as error.

S. HALL, PATE & RYAN, for plaintiffs in error.

P. COOK, R. F. LYON, for defendant, as to the relief plea, cited: 39th Ga. R., 668; 40th, 660. As to novation: 40th Ga. R., 656, 487.

WARNER, J.

The Court below did not err in overruling the motion to suspend the trial of the case, under the resolution of the General Assembly of 1870. That resolution was not *a law* binding on the Court. There was no error in sustaining the demurrer to the defendant's plea.

Let the judgment of the Court below be affirmed.

Salter *vs.* Glenn, Duffield & Company.

SAMUEL P. SALTER, plaintiff in error, *vs.* GLENN, DUFFIELD & COMPANY, defendants in error.

Where the Court below granted a new trial upon the ground that the verdict was contrary to the evidence, and it appears from the record that there was conflicting evidence in the case, and sufficient testimony to have sustained the finding of the jury:

Held, That, while this Court will, reluctantly, interfere with the province of the Court below in granting new trials, yet, it is important to the fair administration of justice that, in all cases where the verdict of the jury is not strongly and decidedly against the weight of evidence, new trials on this ground ought not to be granted.

Where, during the trial of a cause in Court, two jurors go into a grocery to take a drink with a third party, and meet one of the parties plaintiff in the grocery, and the other party is called in, and takes a drink, and before leaving the party, defendant, thus called in, treats to cigars, and one of the jurors takes from his roll of money a twenty-five cent piece, and hands it to the bar-tender, and the same juryman also takes off the bottle of whiskey, all this being known to the plaintiff, and transpiring in his presence:

Held, That such conduct by jurors is reprehensible, and the exculpatory affidavits filed do not relieve it of all obnoxious appearances. Yet as the plaintiff was cognizant of it, and informed his counsel, and no motion was made in the premises, but the case went on to verdict without objection, the granting a new trial, on this ground, was not authorized under the rules of law.

When the Judge charged the jury that, whilst it is true, as a general rule, that two or three witnesses are better than one, and will be more readily credited, yet, in this case, upon the point of what this contract was, if the jury believed that the contract was made between one of the plaintiffs, Mr. Wright, alone, and the defendant, it is witness against witness, and the plaintiffs cannot sustain their version of the contract without additional proof:

Held, That such charge was error, that the witnesses being both of them parties, the case ought to have been submitted to the jury to determine the credibility under all the facts and evidence of the case, and that the Court ought to have granted a new trial on this ground.

New Trial. Jury. Before Judge COLE. Houston Superior Court. August Term, 1869.

Glenn, Duffield & Company sued Salter for $6,834 50 balance on account. He pleaded that he was their agent to

buy cotton; was furnished by them with money for that purpose, and did buy large quantities, specified, for which they agreed to pay him the usual, reasonable, commissions, and that two and a half per cent. on the purchases was reasonable. And he appended to his plea *his* version of the account between them. In it, he charges himself with cash furnished by them, $54,600 00, took credit for $52,761 28, all of which he said he paid out for cotton, bought by him for them, except $5,000 00, which he lost, without any fault on his part. This left them in debt to them $1,838 72. The account then charged them with $9,847 28, being two and a half per cent. on the purchases made by him for them, from specified parties, $3,365 75 of which was on account of an alleged purchase of cotton from Jourdan, and $5,625 00 on account of another from Beall. He claimed balance of $8,008 56, as due to him, and prayed judgment therefor.

Wright testified, that he employed Salter for the firm, and that the contract was that Salter was to have two and a half per cent. on amount paid for small lots of cotton, say from one to fifteen bales, and $1 00 per bale, on large lots; that the account sued on showed the correct balance due the firm. He said Salter contracted for fifteen hundred bales of cotton from Beall, at thirty cents per pound, and paid a *bonus* of $25,000 00, furnished by the firm, but that Beall's cotton was seized by the United States authorities, and the trade, with Salter's consent and approval and at his suggestion, was rescinded; Salter also contracted for one thousand bales from Jourdan, at thirty cents per pound, but as the plaintiffs did not like the samples, they would not take it. But a few days thereafter, Wright, in person, went and bought the Jourdan cotton, by paying thirty cents per pound, and $500 00 to Jourdan's agent. Plaintiffs closed.

Salter testified that the contract was, that he was to have two and a half per cent. He said that he bought the Beall cotton when it was worth thirty-two or thirty-three cents per pound, and that the trade was rescinded in his absence, with-

out his participation or knowledge, when cotton had declined to twenty-eight cents. He admitted that they, at first, declined taking the Jourdan cotton, which he had bought, but that the taking of it, at last, was under information given by him to Wright, and that Wright went, lest Salter's going might arouse suspicion and prevent the sale. He also read papers showing that he was authorized to buy any number of bales of cotton for plaintiffs, and an account against him, rendered by Glenn, one of plaintiffs, in which $20,000 00, in gold, was stated as on the "Beall cotton account."

Other witnesses, including the other parties, testified, touching said $5,000 00 lost, and the facts as to the Beall and Jourdan cotton, and to what compensation was usual for purchasing agents, giving facts and admissions, *pro* and *con.*, as to whether the $5,000 00 was carelessly lost, and as to who really bought said cotton, plaintiffs or defendant.

Argument being had, the counsel for the defendant requested the Court to charge the jury as follows:

1st. That the plaintiffs must prove their accounts sued on, the burden of proof being upon them.

2d. That if the jury believe the account to be taken from the books of plaintiffs, and to purport to give a correct statement of their doings with defendant, as their agent, giving credits as well as debits, and if, from the account itself, they see that important credits are not given to defendant, the omission casts suspicion upon the entire account and the books from which it purports to be taken.

3d. That if plaintiffs rely upon the plea of defendant as proof of their account sued on, they must take the entire plea; they cannot offer a part of it in evidence as an admission without offering all, and if any of it be evidence for them, all is for the defendant.

4th. That, in this case, the plea not having been given in evidence by plaintiffs, cannot be used as evidence by them.

5th. That, if the jury believe that the admission in the plea is founded upon information derived by defendant from

plaintiffs, and that the defendant has been deceived by such information, such admission is no evidence for plaintiffs, especially if the jury believe that the plaintiffs kept the books of account between them and defendant.

6th. That the account sued on here, purporting to give, correctly, the debits and credits, and to strike a correct balance between plaintiffs and defendant, an omission of any important credit casts suspicion on all the account, and the correctness of the balance is clearly disproved; and if the jury believe, from the evidence, that such omission is in the account, the testimony of plaintiffs, that it is correct, is strictly disproved and contradicted, nor can the plea of defendant be used as admitting its correctness or strengthening plaintiffs' case, because said plea is utterly against the correctness of such balance.

7th. That, if the jury believe that these accounts between plaintiffs and defendant were kept in the books of the plaintiffs, such books furnish the highest evidence of the account sued on, and the failure of plaintiffs to produce said books raises a strong presumption that said books, if produced, would operate to their prejudice.

8th. That if the jury believe that the plaintiffs in this case have contradicted each other, or made statements at one time inconsistent with and contradictory to statements made at another time, or have been contradicted by others upon points material to the issue, especially as they are the plaintiffs and directly interested, and especially if the witness contradicting them be disinterested, they become unworthy of credit in this case, and the jury are at liberty to discredit them altogether, and especially, in this case, as to contradictory statements upon material points made, under oath, in answer to interrogatories in the same case. It is not necessary to call the attention of the witness to the contradictory statements then made under oath, before impeaching him.

9th. That, whilst it is true, as a general rule, that two or three witnesses are better than one, and will be more readily

credited, yet, in this case, upon the point of what this contract was, if the jury believe that the contract was made between one of the plaintiffs, (Mr. Wright) alone, and the defendant, it is witness against witness, and the plaintiffs cannot sustain their version of the contract without additional proof.

10th. That, if the plaintiffs seek to produce the admissions or confessions of defendant, as such additional proof, the law is, that all such admissions should be scanned with care, and that, if the jury believe, from the evidence, that the defendant stated, when charged that the contract was $1 00 per bale, that he did not, it is tantamount to a denial that such was the contract, etc., and is no admission of it.

11th. That the *time and place* are of the utmost importance in admissions, where but one witness testifies to it especially; and if that witness be a party interested and makes contradictory statements on oath about time and place, such admission, always to be scanned with care, becomes utterly worthless and cannot avail against defendant.

12th. That, if the jury believe from the evidence that the defendant arranged all the preliminaries of the contract for the Jourdan cotton and completed the same, except the mere payment of the money, and one of the plaintiffs did that, defendant is entitled to his commissions thereon, whatever those commissions may be.

13th. That, if the jury believe from the evidence, that defendant made the contract for the Beall cotton and a *bonus* of $25,000 00 was paid to Rust, the agent of Beall therefor, the contract was a binding one, and Beall became responsible to plaintiffs for the cotton or damages in lieu of it, and defendant became entitled to commissions thereon, whatever those commissions may be.

14th. That if the plaintiffs afterwards rescinded the trade with Beall, even with the advice of defendant, defendant is still entitled to his commissions, unless he expressly waived and gave them up.

15th. That, if the contract for the Beall cotton was re-

scinded, because of the failure of plaintiffs to comply with their contract for the Beall cotton by paying the money therefor, then the defendant is clearly entitled to commissions thereon, and even if the contract was rescinded because of the seizure by the Federal authorities, plaintiffs should have looked to Beall for damages, and not sought to visit it on their agent by depriving him of his commissions.

The first request was given; the second, third, fourth, fifth, sixth, seventh and eighth were refused; the ninth was given; the first clause of the tenth was given, the latter refused; the twelfth request was given; the thirteenth was given, but with the emphatic qualification that if Salter assented to a rescission of the trade, he was not entitled to his commissions; the fourteenth and fifteenth were refused.

The jury returned a verdict for the defendant for ($3,737 09) three thousand seven hundred and thirty seven dollars and nine cents. Whereupon counsel for the plaintiffs moved for a new trial, as follows:

1st. Because the verdict of the jury in said case is contrary to law and the evidence, and against the principles of justice and equity.

2d. Because said verdict is decidedly and strongly against the weight of the evidence introduced on the trial of said case.

4th. Because of the misconduct of John S. Pool and William F. Engram, two of the jury who tried said case, as shown by the affidavit of F. M. Henser.

5th. Because of the misconduct of and improper influence used by the defendant on John S. Pool and William F. Engram, two of the jurors in said case, as shown by said affidavit of F. M. Henser.

6th. Because C. J. Goodwin, one of the jury who tried said case and rendered said verdict, was not an impartial, but a prejudiced juror, and because of his misconduct, as shown by the affidavit of Patrick Gray.

7th. Because the Court erred in giving in the charge to

the jury on the trial of said case, the following written request of defendant's council, to-wit: That whilst it is true, as a general rule, that two or three witnesses are better than one and will be more readily credited, yet in this case, upon the point of what this contract was, if the jury believe the contract was made between one of the plaintiffs (Mr. Wright) alone and the defendant, it is witness against witness, and the plaintiffs cannot sustain their version of the contract without additional proof.

The fourth, fifth and sixth grounds were explained by affidavits of the following purport:

Henser's affidavit: In the evening after Court adjourned, Engram, Pool and Salter came into the store, one called for a bottle of whisky, and all of them took a drink. Some money passed between Salter and Pool; the whisky was paid for by one, (which, he did not know,) and after the drinking, Pool said he was going to carry the bottle with him.

Pat Gray's affidavit: Goodwin came to where Gray and one Solomon were talking, said he had a chill and was near giving up, when he and Gray had the following colloquy, substantially, as Gray remembered it:

"I told him he ought to hold out, as it was an important case, and had taken two days in the trial already. That it involved a great deal of money, and I should like to have some of it myself. He said yes; that it was all northern capital and he thought that Salter might as well have his part of it. I then remarked that I thought the men were from Tennessee or Kentucky. He said that might be, but they were engaged or operated upon Northern capital." Gray also swore: "I do not know the juror, nor do I know him except from information derived from said Solomon. I know that he was on the jury that was trying the case referred to, because I had seen him on it while the trial was going on."

It was shown that neither plaintiffs nor their attorneys knew these facts before the verdict, except that they knew the facts stated in Henser's affidavit, shortly before the Court

met next morning, when the concluding argument in the cause was to be resumed.

In response, Salter's counsel produced the affidavit of Goodwin, giving this version of the meeting with Gray and Solomon:

"The affidavit of said Pat Gray is untrue. Deponent went off the jury to the basement of the Court-house on the adjournment of the Court for dinner, on Wednesday last; having had a chill on the jury, and being feverish, he went to the zinc or block-tin basin there for the purpose of bathing his face and head. Gray and Cary Solomon were conversing there. Deponent remarked that he had a chill, and hoped the lawyers would not consume much time in the argument of the cause as he was sick. This deponent said whilst bathing his head, and in reply to Cary Solomon, who said to deponent that he was looking feeble. That he never said a word about the cause, except to express the hope that the lawyers would not argue long as aforesaid. That he did not say 'it was all northern capital, and he thought that Salter might as well have his part of it,' or anything like it. That he never heard Gray say that the case had taken two days, was an important case, and that he, deponent, ought to hold out, that it involved a great deal of money, and he, Gray, should like to have some of it himself, nor did he hear him say he thought the men were from Tennessee or Kentucky, nor did he, deponent, reply, 'that might be, but they were engaged in or operating upon northern capital,' nor any words to that effect or like it, at all.

"This deponent swears positively that he had no conversation at all about the case, with said Gray or Solomon, on the occasion referred to, except to express the hope that the lawyers would not argue long, nor did he hear them or either of them say one word about the case on that or any other occasion. That he was not there but one or two minutes at farthest, just bathed his head and face and left, and if anything passed between Gray and Solomon about the case,

deponent did not hear one word of it. That deponent was so particular in observing the charge of the Court not to speak about the case or suffer any one to speak to him about it, that he did not even mention to his wife what case he was sitting upon till it was over. That he knew none of the parties, never saw defendant, Salter, till this Term of the Court, and was perfectly impartial and unprejudiced as a juror. That he is more positive that he had no conversation with said Gray, and that his statement is untrue, because he, deponent, had no acquaintance at all with said Gray, and would not know him now if he were to see him."

Solomon's affidavit said Goodwin's narrative of what he said and did was true, and that the other remarks passed between Solomon and Gray after Goodwin left.

Engram, Pool, Salter and one Burnside, gave the following explanation of the drinking, etc., by their respective affidavits.

Engram's affidavit: "On Tuesday, at adjournment of Court for dinner, went in company with John S. Pool, to the store of G. W. Killen & Company to take their lunch in the counting office of said store. When they got there, Mr. Wright, one of the plaintiffs, was at the table where the water-bucket was. Pool asked Wright to drink with us, saying we have a bottle of whisky there. Wright declined, stating that he had a bottle himself, and asked us to drink with him, taking his bottle from under the table and setting it on the table. We declined, and he then set it back under the table.

"On Wednesday evening, after Court adjourned for the night, Pool and deponent went again to the same place, in company with James Burnside, who got a bottle of whisky and asked us to drink with him. Wright was there then also. Deponent took a drink and left. Does not know whether the others drank. Salter was also there with Wright, but neither Salter nor Wright asked deponent to drink, but he drank with Burnside, who called for the whisky, and deponent supposes paid for it.

"Deponent never drank with defendant (Salter) during the progress of the trial. Had never been acquainted with him up to this trial. Never exchanged a word with him about the case, nor on any other subject, except once to ask him how old he thought a horse was. This was all he ever said to Salter, and Salter's reply was, 'over five years old.' That was all Salter said to him (deponent) pending the whole trial, and even that reply was not made specially to deponent, for there was a crowd around, and others judging the age of the horse.

"Deponent further states that he was perfectly impartial as a juror, had no bias or leaning for or against either party, but decided the case according to the right, as he honestly believed."

Pool's affidavit: "Deponent, on Tuesday last, at the adjournment of the Court for dinner, went in company with William F. Engram, one of his fellow jurors, to the store of George W. Killen & Company to take their lunch in the counting office of said store. When they got there, Mr. Wright, one of the plaintiffs, was at the table where the water-bucket was. Deponent asked Wright to take a drink with him and Engram, deponent and said Engram having a bottle of whisky there. Wright declined, stating that he had a bottle himself, and asked them to drink with him, producing his bottle and placing it on the table. They declined drinking with him, and then Wright put his bottle back under the table.

"On Wednesday evening, after the adjournment of Court, deponent met James Burnside in the streets near the Courthouse, and said to him, 'let's have a drink, it is your treat,' to which Burnside replied, 'let's go to George Killen's and get it.' On the way to Killen's they met W. F. Engram, and invited him to go along with them, He accepted the invitation, and they went over together. After they got into the house, Burnside stepped to the door and called Salter. He, Burnside, went into the store and bought the whisky. Wright, one of the plaintiffs, being in the house at the

table where the water sat, Burnside then set out the bottle when Engram drank and left. Burnside and deponent then drank. Burnside asked Wright to take a drink, which he declined, stating he had just drank. Then Burnside invited Salter to drink, and after the others had drank he did so. After the drinking, Salter, standing at or near the front door of the store, drew out his money to pay for some cigars, when deponent, by way of a prank and in jest, took from the money twenty-five cents, which he handed to Henser, the clerk. Wright was present and the cigars were distributed among the company, including Wright. This is all the money that ever passed between Salter and deponent, and must have been the money alluded to in Henser's affidavit.

"Deponent carried the bottle of whisky off, as Burnside had told him he could do so. Salter never treated or offered to treat deponent during the progress of the trial, to whisky or anything else, and he had no conversation with Salter concerning the case, either before or pending the trial, and that his mind was impartial between the parties, and he was influenced in his verdict by the law and testimony alone, as he understood them."

Burnside's affidavit: "The affidavit of Henser has been carefully read to him in relation to the transactions therein set forth. Deponent saith, that at the adjournment of the Court on Wednesday evening last, he met Pool on the street near the Court-house, who said to deponent, 'Let's have a drink, it is your time to treat,' to which deponent replied, 'let's go to George Killen's and get it.' On the way to Killen's store they casually met Engram, and invited him to go along and drink with them. Upon the arrival of deponent and said two jurors at the store they found Wright, one of the plaintiffs in said case, there. After reaching there deponent called the defendant, Salter, and invited him to take a drink. Deponent bought and paid for a bottle of whisky, and when it was opened Engram took a drink and then went off. Subsequently thereto, deponent and Pool

drank, afterwards Salter took a drink. Deponent also invited Wright to drink, who excused himself, saying he had just drank. Deponent told Pool he might have the remainder of the bottle, and he took it and carried it away.

"Before the parties separated Salter called for cigars, and taking out a role of his money to pay for them, Pool, apparently in jest and for the purpose of playing a prank upon him, took twenty-five cents out of the bundle and handed it to the clerk, (Henser.) When the cigars were put out such of the party as smoked, including Wright, helped themselves to them.

"Deponent was present during the whole time of this transaction, and everything that was said and done was in the presence of said Wright. There was no conversation whatever had between Salter and any of the parties touching said cause, and so far as deponent knows, or believes, the meeting and subsequent intercourse of the parties aforesaid was altogether casual, and was not brought about by any previous arrangement and understanding whatever."

Salter's affidavit: "The affidavit of Henser filed with the motion for a new trial in said case has been read to him, and he states in relation to the charges therein contained against him and the jurors, Pool and Engram, that on Wednesday evening last, after the adjournment of the Court, James Burnside called him and asked him to come over to the store of Killen. That he went to said store, and upon reaching there he found Wright, one of the plaintiffs, the two jurors aforesaid, and the said Burnside. He took a drink out of a bottle there upon Burnside's invitation; that he drank with neither of the jurors aforesaid, and had no conversation with either of them upon the subject of the case then on trial; that everything said and done by or to said jurors on the occasion in question, was said and done in the presence of said Wright. That after deponent had taken his drink, and was standing with the balance of the party near the store door, he, deponent, ordered some cigars, and

taking his roll of money from his pantaloons pocket to pay for his cigars, was unrolling it, and to his surprise, and without speaking at all on the subject to him, the said Pool took a twenty-five cent bill, seemingly in play and jest, from the pile, and handed it to said Henser, the clerk. When the cigars were furnished, such of the party as smoked, including Wright, helped themselves. Deponent says that said meeting, and the incidents connected therewith, was entirely casual, and not the result of any previous understanding or arrangement between him and any of said parties."

The Court granted a new trial on the following grounds:

"1st. Because the jury found contrary to the evidence and the decided weight of the evidence.

"2d. Because there was a decided interference with two of the jury, that had a tendency to impair the purity of jury trials, and especially as the finding of the jury was against the evidence and without sufficient evidence to support it.

"3d. Because the Court erred in charging the 9th request of the defendant's counsel. I should have charged that in such a case they must weigh the evidence and find their verdict according as they believed from the evidence, and that they might look into all the evidence and see whether one or the other was corroborated." This grant of a new trial is assigned as error.

S. D. KILLEN; HALL & BROWN, NISBETS & JACKSON, for plaintiff in error. Burden of proof on plaintiffs: 1st Ch. Pl., 228, 229; Gould's Pl. Ch., 3, secs. 184, 189. As to discrediting witnesses: Code, secs. 3816, 3808, 3809; 1st Murphy's R., 124; Hawkins' P. C., 323. Admissions: Code, sec. 3739. As to new trials: Code, secs. 3662, 3666; 33d Ga. R., 529; 21st, 261; 22d, 211. Finney *vs.* Sandford; Sims & Co. *vs.* Humber, June Term, 1870; Brown *vs.* Reed, this term. The requested charge was right: 1st Ch. Pl. and Gould's Pl. *Supra;* 33d Ga. R., 182; Code secs. 3080, 3815, 3816, 3737. As to jury: 11th Ga. R., 203; 17th, 414; 34th, 379; 18th, 534; 28th, 382.

S. HUNTER, LANIER & ANDERSON, for defendant.

LOCHRANE, C. J.

The record in this case comes before this Court on exceptions taken to the judgment of the Court below granting a new trial. It appears that Glenn, Duffield & Company brought their action on an account against Salter to recover a balance alleged to be due of $6,834 50. To this action Salter, by plea, set up a contract entered into between himself and the plaintiffs to purchase cotton for them, and for which he was to receive certain commissions. The plea sets out fully the contract, the cotton bought, the account between these parties, alleging the sum of $8,008 56 to be due him, for which he prays judgment against the plaintiffs. The case came on for trial at the August Term, 1869, and the jury found for the defendant against the plaintiffs the sum of $3,737 09.

At the same term of the Court a motion for a new trial was made by the plaintiffs upon several grounds, and the Judge granted the new trial on three of the grounds taken, to-wit: First, Because the jury found contrary to the evidence, and against the decided weight of the evidence. Second, Because there was a decided interference with two of the jury that had a tendency to impair the purity of jury trials, and especially as the finding of the jury was against the evidence, and without sufficient evidence to sustain the verdict. Third, Because the Court erred in charging the ninth request of the defendant's counsel, which was as follows: "9th. That whilst it is true, as a general rule, that two or three witnesses are better than one, and will be more readily credited, yet, in this case, upon the point of what this contract was, made between one of the plaintiffs, (Mr. Wright,) alone and the defendant, it is witness against witness, and the plaintiffs cannot sustain their version of the contract without additional proof." And these are the grounds presented for review as the assignments of error in this case.

Salter *vs.* Glenn, Duffield & Company.

1. It is not a question under our Code, sections 3860 to 3670, inclusive, but that the Superior Courts may grant new trials and the judges may "exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of evidence:" Code, section 3666. And in cases not provided for in the Code, this sound legal discretion is to be exercised "according to the provisions of the common law and practice of the Courts."

In this case the defendant in error urges with earnestness and confidence, that the discretion of the Judge has been abused in granting a new trial on the first ground, that the verdict was contrary to the evidence. It will be seen that the exercise of this discretion is lodged by the law in the Superior Courts, and how far it may be reviewed on writ of error we will briefly examine before passing on the merits of its exercise in this case, remarking that it has been often held by this Court, as a rule, that this Court will be more indisposed to control the decision below in granting than in refusing a new trial: 35th Georgia, 291; 36th Georgia, 321, 604. This general principle may be found as universally admitted and the reasons which have led to it are not only reasonable but legal. Many of the cases go farther than mere indisposition or reluctance, and broadly assert that only in extreme cases will it be done: 26th Georgia, 164. These terms do not define accurately the ground of interference. They are based upon principles well recognized; but the difficulty arises on the application of them to the case. In 36th Georgia the principle is more clearly stated. Judge Walker delivering the opinion says: "When the Court below grants a new trial and no principle of law is violated, this Court will not disturb the ruling." In 40th Georgia, 91, by Brown, Chief Justice, the judgment of the Court is substantially the same, the question being did the Court abuse his discretion in granting a new trial.

After this brief glance at what has been decided, we lay down the rule as now established, that the Court below is

invested with a sound legal discretion in granting or refusing new trials, and where, in the legitimate exercise of that discretion, no rule of law, or the principles of equity regulated by law has been violated, and the power vested in the Superior Court has been judicially administered, this Court will not assume the control of the legal discretion of the Judge below. Our right only arises in an abuse of it, or in some error of law committed by the Court in its exercise. We are not prepared to treat the judgments of the presiding Judge, fresh in the memories of the trial and witnesses to the proceedings in the Court, and with a better opportunity relating to do justice between the parties as matters of little weight. On the contrary, with a full appreciation of the ability of the judges below, we consider their judgments, particularly in matters of granting or refusing new trials, with close scrutiny before we will assume the control of setting them aside.

In this case, we do not deem it necessary to go through this volume of testimony, nor express our opinions of its merits or demerits, further than is demanded for the purposes of our judgment. We find that the testimony conflicts as to the material points of the matters in issue. First, as to the matter of compensation, how much the defendant was to receive; and second, as to the Beall and Jordan lots of cotton, whether he was entitled to his commissions on these lots. In the Beall cotton, the rescission of the purchase, its effect, and the consent thereto, the whole matter arising out of the contract and compensation was fairly laid before the jury, and there was evidence either way to have sustained the verdict, sufficient not to have set it aside. And in matters of verdicts found by juries upon facts fairly submitted, Courts, because of individual opinions of the evidence, ought not to infringe the rights of juries by setting aside their verdicts, except such verdict is strongly and decidedly against the weight of the evidence, or contrary to evidence and the principles of justice and equity.

And where Courts set aside verdicts except upon principles laid down, *it is error;* for the law nowhere authorizes such judicial interference with the fundamental rights of trial by jury. Dissatisfaction with the finding of the jury is no ground to set it aside. There must be an act in the verdict violative of law. That act may consist in the jury finding against the decided weight of the evidence; for the law demands that they shall find according to the evidence under the rules of law, and the law directs the verdict in cases of decided weight or preponderance. And in this case we hold that the first ground did not invoke judicial interference to set aside the verdict.

2. The second ground of error is the granting a new trial upon the misconduct of the jury. There is nothing in which Courts will go farther than in their protection of the jury box. Here every precaution is necessary for the proper and pure administration of justice. But in the jury box, if purity and integrity are not preserved, every principle of right and virtue dies. This Court has been vigilant in protecting the jury from even the suspicion of injustice. In *Walker vs. Walker*, 11 Georgia, 204, where one of the jurors was entertained at the expense of a party, the verdict was set aside, notwithstanding the affidavit of Respass, the juror, that he had been intimate for twenty years with the party, had not conversed with him about the trial, nor was he influenced by the act, etc. And again, where the attorney took home the horse of one of the jurymen, in their decision, as well as many which might be quoted, Courts have gone far to set aside verdicts when the jury have been tampered with. But in this case, the evidence on the part of the jurors accused seems to exculpate them from any criminal intent on their part. In the case of Goodwin, the statement of Gray was contradicted both by the juror and by the witness who was present, and we do not think that what transpired was sufficient to set aside the verdict.

In relation to the other two jurors, the evidence discloses

that, casually, they went to the grocery to get a drink. The plaintiff was there, and the defendant was called in. He drank after they drank, and going to the counter to treat to cigars, one of the jury took twenty-five cents from the roll of money and handed it to the clerk. The evidence is that he carried off the bottle of whisky. It is true, both parties were present, both looking on and participating. It is also true, that counsel knew of what transpired before concluding the case, and yet went on with the argument. All these facts are true, and we may, in the most generous view of this case, think that nothing really corrupt was intended, or did, in fact, transpire, and yet we are not altogether satisfied with the meeting and mingling of jurors and parties at this grocery. This Court, in 18 Georgia, 534, has held it insufficient to set aside a verdict, when some of the jurors entered a grocery and had conversation with various persons, not in relation to the case, and in presence of the bailiff and the accused. But the Court regarded the conduct reprehensible, notwithstanding the exculpatory affidavits of the jurors and bailiff, and only affirmed the verdict because no injury resulted from the improper conduct.

We might remark that the practice of receiving exculpatory affidavits is not generally received in support of verdicts, no more than in impeachment of them, and is restricted to such issue only as applies to the juror himself, in case of purging contempts. The mere fact of taking a drink in a grocery will not vitiate, but where the party treating calls in the defendant, and he and the plaintiff are both present and one of the jurors takes off the bottle, there may be something in this unexplained liberality that might have been intended to, and in fact did influence the result. In the case of misconduct, in 2 Swan, 348, the Court evidently held the treating of the juror to soda water, etc., by defendant, improper, but inasmuch, under the practice of Tennessee, as it appeared, he was in favor of a verdict for plaintiff, it was held insufficient to set aside the verdict. And in 8 Grattan it

is not misbehaviour for jurors to drink with a witness for the Commonwealth, if it is done in the presence of the sheriff and as a courtesy. Such is the principle held in 32 Maine, 334. Misconduct, without injury to either party, will not vitiate. But in the case under review, the misconduct, although explained, is still uncertain as to its effects upon the finding.

If it was known to the plaintiff, however, it was his duty to have made objection, if he believed it was injurious to him or his interests, and having failed to make it known at the time, he will be held, under the circumstances, to have waived it; and it is too late to complain after the verdict is found against him. And we do not hold that a new trial ought, on this ground, to have been ordered.

3. We come now to the last proposition in this case, and that is upon the Judge's charge, as requested. We are clearly of opinion this this charge was error, and the Court ought, to have granted a new trial on this ground. "If the jury believe that the contract was made between one of the plaintiffs, Mr. Wright alone, and the defendant, it is witness against witness, and the plaintiffs cannot sustain their version of the contract without additional proof." In *Brooks vs. Smith*, 21st Georgia, 261, this Court held: "Where the testimony seems to be equally balanced, a single witness deposing on each side, the Court will not grant a new trial because the verdict is contrary to the evidence. It is for the jury alone to decide upon the credibility of the witnesses. This case is decided by the principle laid down in 39 Georgia, 359–60, and in the case of *Brown vs. Reed*, at this term; and we therefore affirm the judgment of the Court below granting a new trial on this ground.

Judgment affirmed.

JAMES MARTIN, sheriff, plaintiff in error *vs.* MARK A. HUSON, defendant in error.

(LOCHRANE, C. J., being security for the sheriff would not preside.)

An execution was placed in the sheriff's hands, which issued on a judgment rendered since the first of June, 1865, and a rule was taken against the sheriff requiring him to show cause why he should not be attached for contempt of the process of the Court in failing to make the money due the plaintiff therein. And the sheriff shewed for cause that he had been notified by the defendant that the judgment on which the execution issued was obtained on a debt or contract made prior to to the first of June, 1865, and that the collection thereof was suspended by a resolution of the General Assembly, passed in 1870; that the defendant promised to save the sheriff harmless in the event of his not proceeding to collect the same. Upon this showing of the sheriff the Court made the rule absolute against the sheriff for the amount due on the execution, to which the sheriff excepted:

Held, That there was no error in the judgment of the Court below in making the rule absolute against the sheriff, upon the showing set forth in the record, that the sheriff's duty was to have proceeded to collect the money due on the execution, unless the defendant had filed an affidavit of illegality thereto, or unless restrained by some other legal process, from doing so.

A rule against a sheriff for money, and an attachment for not paying over that money, all occurring at the same term, are the same cause, and may be joined in one bill of exceptions. (R. See end of Report.)

Stay-Resolution. Sheriffs. Practice. Supreme Court. Before Judge COLE. Bibb Superior Court. May Term, 1870.

In July, 1869, Huson obtained a judgment, in said Court, against G. B. Roberts and W. L. Stark. (See Huson *vs.* Roberts, *et al.*, 40th Georgia Report, 30.) *Fi. fa.* issued upon said judgment on the 21st of March, 1870, and was handed to the sheriff for collection. He having failed to make the money, was, at May Term, 1870, ordered to show cause why he should not pay Huson the amount of the *fi. fa.* His answer does not appear by the record. But sufficient appears to show that his excuse was that defendants claimed that said *fi. fa.* was founded upon a debt made prior to June, 1865, and was, therefore, stopped by the stay-reso-

lution of 1870, viz: ("That all the proceedings in the several Courts of this State founded on any debt or contract made or entered into before the first of June, 1865, and all levies and sales by virtue of any execution so founded shall be and are hereby stayed until twenty days after the recess taken by this General Assembly shall have expired,") and promised him if he would not levy they would protect him, and pay the debt if the Court decided that he ought to have levied. The Court held this excuse to be insufficient in law, and ordered the sheriff to pay the amount due on the *fi. fa.* Failing to do this, he was called on to show cause why he should not be attached for contempt. To this he replied, as aforesaid, with this addition: He was advised, and believed it was right, to decline levying under the circumstances and therefore declined. The Court granted an order that he be imprisoned till he paid said *fi. fa.* The granting of the said two rules is assigned as error.

When the cause was called here, the record in Huson *vs.* Roberts *et al.*, used in another case, to-wit: Huson *vs.* Martin was agreed to be used here. The Judge certifies that said record was not used before him in the Court below. It is immaterial to say more about it here than that Martin's counsel said the case was covered by the resolution, because the contract was made before June, 1865, but Huson's counsel said that the judgment was for a default occurring after the 1st of June, 1865. Counsel for defendant in error moved to dismiss the writ of error because it was double, in that the rule for the money and the rule for contempt were distinct causes. This was held to be no ground for dismissal. They then moved to compel counsel for Martin to elect upon which of said cases they would proceed. The Court held that there was but one case in the bill of exceptions.

W. K. DeGraffenried, B. Hill, for plaintiff in error.

R. F. Lyon, Jno. Rutherford, for defendant.

WARNER, J.

On the statement of facts contained in the record of this case, there was no error in the judgment of the Court below in granting the rule absolute against the sheriff for the amount due on the execution in his hands for collection.

Let the judgment of the Court below be affirmed.

MARK A. HUSON, plaintiff in error, *vs.* JAMES MARTIN, sheriff, defendant in error.

Execution issued upon a judgment obtained in 1869, and a rule was moved against the sheriff for not paying over the money on the *fi. fa.*, which rule proceeded to attachment, absolute, to which the sheriff accepted, and superseded the enforcement thereof by bond, in terms of the law.

And, after such proceedings against the sheriff, and the carrying the case to this Court, the plaintiff in *fi. fa.*, petitioned the Court, setting out these facts, and the whole record in the original suit, to instruct the sheriff to levy the *fi. fa.*, upon the ground that such payment was not based on a contract between the parties before june, 1865, and, consequently, was not within the resolution of the Legislature staying the levy of *fi. fas.*, on such contracts, which instructions the Court refused to give upon the ground that he had already granted an attachment absolute for the money due on the *fi. fa*:

Held, That there was no error to refuse the instructions under the circumstances. The party plaintiff had his option to initiate his proceedings in the Court below by rule or action against the sheriff, or, waiving any step against him primarily, to have brought the matter for instructions to the sheriff before the Court, upon proper petition, making the defendants parties thereto. But having instituted proceeding by rule against the sheriff officially, and the judgment thereon having been, under the provisions of the law, superceded during its pendency in this Court, the whole case was suspended, and the *fi. fa.*, could not proceed at the instance of the plaintiffs in *fi. fa.* And it was proper in the Judge to decline such instructions, and especially as his judgment on the rule was already the adjudication of the question sought to be readjudicated by the petitioner.

Sheriffs. Practice. Stay-laws. Before Judge COLE. Bibb Superior Court. May Term, 1869.

Huson's counsel ruled the sheriff for not collecting his *fi. fa.* against Roberts *et al.*, obtained a judgment requiring him to pay the amount, and, on his failure to pay, an order absolute for his imprisonment till he did pay said amount to Huson. The sheriff sued out a writ of error and thus superseded said judgments. At the same time, pending this *supersedeas*, Huson's counsel stated to the Court that the pretence by which the sheriff had been induced not to make the money, was that it was for a debt contracted prior to June 1865, and was therefore stayed by the Stay-resolution of 1870; that said resolution and the Relief Act passed afterwards were unconstitutional, and, if not, that this cause was not covered by them. To prove this, they presented the original record and evidence in Huson *vs.* Roberts *et al:* 40 Ga. R., 30. And without making Roberts *et al.*, parties to the motion, moved the Court to order the sheriff to proceed to collect said *fi fa.*, notwithstanding said Stay-resolution and Relief Act.

The Judge declined to grant such order, upon the ground that the *fi. fa.* itself was an order for the sheriff to proceed, and because he had just passed the orders absolute aforesaid, because of his failure to proceed. This refusal is assigned as error.

R. F. LYON, JOHN RUTHERFORD, for plaintiff in error.

W. K. DEGRAFFENRIED, for defendant in error.

LOCHRANE, C. J.

The record in this case discloses that Huson had a judgment against Roberts and Starke, obtained in 1869, upon which execution issued, and was placed in the hands of the sheriff, Martin, to levy; that a rule had been taken against

the sheriff for not paying over the money thereon, and the sheriff had answered the rule, and the Court adjudged his answer insufficient, and made the attachment absolute; that the sheriff excepted to the judgment of the Court in the premises, gave bond operating as a *supersedeas* until the hearing of the case before this Court.

Subsequent to these proceedings, upon the rule against Martin, sheriff, this case was presented to the Court by petition setting out these facts and the whole record of the original suit below, and asking the Court to instruct the sheriff to proceed to levy and make the money on the *fi. fa.* The Judge declined giving the instructions asked upon the ground that he had already granted the attachment absolute for the money due on this *fi. fa.*, against the sheriff. And this judgment constitutes the error complained of.

This question is somewhat anomalous, and arises under the peculiar circumstances of the case. In the answer of the sheriff to the rule, he sets out as his *excuse* or reason for not making the money, that the resolution of the Legislature staying the collection of *fi. fas.*, obtained upon debts contracted before June, 1865, prevented him making the money. And this direction was invoked upon the two propositions:

1st. That the record disclosed that this case was not within the resolution, and

2d. That the ministerial character of the sheriff's office and his good faith, might be a ground for his protection, and the instructions prayed were intended to anticipate the judgment of this Court, and leave him without excuse or defense thereafter, in case he should be protected.

In our opinion the party plaintiff had his option to initiate his proceedings in the Court below. The sheriff was liable to rule or action, but not both, and proceedings against him upon rule for the money, suspended other action until that was disposed of. On waiving any step against the sheriff primarily, they had the right to proceed before the Court for instructions directing the levy, upon proper petition, mak-

ing the defendants thereto parties, and adjudicating the rights presented by petition, and answers in the premises; but having instituted their proceedings directly against the sheriff, other modes were suspended until this was discharged.

And inasmuch as the sheriff, by his bill of exceptions, superseded the judgment against himself for the money due on this *fi. fa.*, we are of opinion, that the Court had no other instruction to give. He had already decided the question raised by this very petition as against the sheriff, and he could not conclude the parties, defendant, by a judgment on their respective rights, in such a summary mode as that invoked by the pleadings in this case. We therefore affirm the judgment of the Court below.

Judgment affirmed.

J. W. BURGE, plaintiff in error, *vs.* CHARLES STROBERG, defendant in error.

Where, in a trade of horses, B. asserts certain material facts inducing the trade relating to the age and soundness of the horse, which prove to be untrue, and B. also promised, in case anything was wrong, to make it right:

Held, Upon a suit brought by S. against B. on the breach of warranty, that no particular words are necessary to constitute a warranty, and that the jury under the facts of this case and the charge of the Court, were the proper judges of the intention with which such statements were made, and their finding for plaintiff was not contrary to law or evidence, and the Court committed no error in refusing a new trial on the ground taken.

Warranty. Before Judge COLE. Bibb Superior Court. November, 1870.

Stroberg claimed damages from Burge for the breach of a verbal warranty of a horse. The evidence sufficiently appears in the opinion.

The Court was requested to charge the jury, that if Burge simply said that his horse was fourteen years old, without

intending to represent him as no older, Burge was not liable for misrepresentation as to the age of the horse. He so charged, but added, that if Burge intended to decieve as to the age of the horse, he was liable.

The jury found against Burge. He moved for a new trial, because the verdict was contrary to law and the evidence, and because of said charge.

LYON & DEGRAFFENREID, for plaintiff in error.

A. O. BACON, for defendant. The charge was right: 6th Ga. R., 473; R. Code, sec. 2592, 3117.

LOCHRANE, C. J.

The evidence in this case shows that Burge proposed to trade a horse which he had, for a mule belonging to Stroberg. Stroberg told Burge he thought the horse was diseased, which Burge denied, but said he was an old horse, thirteen years of age, and afterwards corrected himself by saying fourteen. Some boot was asked by Stroberg, and they did not trade. The same day Burge came back, giving the boot asked and promising, if anything was wrong about the horse, to make it right. The horse died in about six weeks, being, by the evidence in the case, about twenty three or four years of age. The mule, Burge got was worth two hundred and twenty-five dollars, ($225 00) and the boot paid was $20 00. Burge refused to take the horse back as soon as Stroberg found out his age and condition. The jury found for the plantiiff $85 00, and the defendant moved for a new trial on the ground, that the jury found contrary to the law and evidence, and the charge of the Court.

We see no reason to set aside the judgment of the Court below upon either of the grounds taken. It is clear from the evidence, that the verdict of the jury was amply sustained in this case. The suit was for breach of warranty, and the proof sustains the pleadings. In *Terhune vs. Dever*,

36 Georgia 648, it is held that no particular form of words is necessary to constitute a warranty. Every affirmation at the time of sale of personal chattels is a warranty, provided it appears in evidence to have been so intended. The tendency of all modern cases on warranty, "is to enlarge the responsibility of the seller, to construe every affirmation by him to be a warranty." And while representations made at the time of sale may amount to fraud, the right of action on the breach exists under the law upon the contract, irrespective of such fraud on the part of the seller. The rules of law governing sales requires the utmost good faith, and devices to evade the candid and honest dealing of parties is disapproved by the Courts. The idea in this case of stating a horse was fourteen years old, without saying how much more he was, cannot be recognized as such a representation in good faith as the law requires. And it made no difference whether the seller knew he was older or did not, the law implies the same liability. In *Smith and Shorter vs. Mitchell*, 6 Georgia, 473, Judge Nisbet ably discusses this whole doctrine subsequently embodied in the Code, section 2592, and this principle of law is now beyond controversy.

Burge's own testimony in this case, brings the contract within the principle; for if he did not know the horse's age, he had no right to affirm his age: Code, sec. 3117. Equally true is the application of the law to the statement of the soundness of the horse, especially as there was evidence before the jury, "if anything was wrong, he would make it right." This presented to the buyer such a contract, coupled with the statement of Burge, as authorized him to rely and act upon the affirmation of Burge, and the charge of the Court, submitting the facts to the jury, was not error under the law and facts of the case.

Judgment affirmed.

THEODORE W. ELLIS, plaintiff in error *vs.* J. H. ZEILIN & COMPANY, defendants in error.

1. Complainants alleged that they are entitled to the sole and exclusive right to manufacture and sell a certain preparation known as Dr. Simmon's Liver Regulator or Medicine, and have acquired right thereto by purchase; and that they have expended large sums of money in manufacturing and advertising it, by which it has become widely known and justly celebrated for the purposes it is intended to accomplish. And that they have adopted certain trade-marks, in which their packages are put up; and that the plaintiff in error has commenced to sell a preparation which he calls by nearly a similar name, and is putting it up in packages of similar form and size, and that the general appearance and printed endorsements thereon, is intended to take advantage of the reputation acquired by the preparation of Zeilin & Company, which they allege is a fraud upon their rights, etc. To which bill a demurrer was filed, which was overruled by the Court:

Held, That under the facts charged in the bill, admitted by the demurrer, this Court will not reverse the judgment of the Court below, upon the ground that the bill alleged sufficient *prima facie* evidence to predicate the claim of property in Zeilin & Company to the exclusive right, to make and sell such medicinal preparation sufficient to retain the bill until a hearing, upon the evidence to be submitted in the case.

2. *Held again*, That in matters of trade-marks or labels to medical compounds, mere similarity of size, or square packages, or of classification of diseases or symptoms, is insufficient to invoke equitable interference, that compounding patent medicine is an open trade, and protection by law is only authorized when the invention itself or its own peculiar name and devices, are taken by appropriation and put upon the public in fraud of individual rights acquired by priority of use and title therein.

Trade-Marks. Copy Right. Equity Practice. Before Judge CLARK. Chambers, Bibb County. August, 1869.

J. H. Zeilin & Company sought to enjoin Ellis from making and vending certain medicine in such packages and wrappers as was calculated to injure their sale of a similar medicine for which they had a patent. The similarity of the packages and wrappers cannot well be shown here. The main charges in the bill are set forth in the opinion. Judge Cole being related to complainants, referred the bill to Judge

Clark. He ordered Ellis to show cause why the injunction should not be granted. He answered, and, after argument had, Judge Clark ordered the injunction to issue.

Subsequently, Ellis demurred to the bill because it had no equity, because J. H. Zeilin & Company showed no exclusive right to make and vend such medicine, and because the bill showed that their medicine was a quack remedy, a deceit upon the public, and not deserving the protection of a Court.

Complainant's counsel contended that the demurrer could not be entertained, because, by the granting the injunction after a hearing, from which no writ of error was sued out, the matter was *res adjudicata*. Judge Clark overruled the demurrer, and that is assigned as error.

WHITTLE & GUSTIN, JOHN P. FORT, for plaintiff in error. To enjoin use of trade-mark complainant's title must be clear: Hopk. Ch., (N. Y.) 553; 4 E. D. Smith's R., 390; 24 Barb. R., 164; Law Dig., 409 to 412; 2 Sand. Ch., 622, 628. Complainants did not invent but bought of another, not inventor, who was "authorized only to make and sell" the same. This is only an agency: R. Code, sec. 2152. No delegation: R. Code, sec. 2153. Death of seller revoked this agency: R. Code, sec. 2157. Copyright does not extend to labels: 1st Brightwell's Dig., 193; 2d, 90. The medicine is a secret, quack, medicine, not entitled to judicial protection: 11 Law Rep., 130; Law Dig., 275.

LANIER & ANDERSON, for defendants.

LOCHRANE, C. J.

1. The defendants in error filed their bill in equity, alleging that they are entitled to the sole and exclusive manufacture and sale of a certain medicinal preparation known as "Dr. Simmons' Liver Regulator or Medicine," having acquired the right thereto by purchase from the son of Dr. A.

Q. Simmons, the inventor. They allege that they have expended large sums of money in manufacturing, advertising, etc., and that it has become widely known and justly celebrated for the purposes it is intended, medically, to accomplish, and that they have adopted certain trade-marks in which their packages are put up, which have been entered under the Copy-Rights law in the District Court of the United States, at Savannah.

They further allege that Ellis, the plaintiff in error, has commenced to sell a preparation which he calls "Simmons' Genuine Liver Medicine," and is putting it up in similar form and size of packages, and the general appearance and printed endorsements thereon is intended to convey the impression and take advantage of the reputation which Zeilin & Company's preparation has acquired, and which they allege to be a fraud on their rights, asking injunction and such other relief as may be within the power of a Court of Equity to interpose.

To this bill the defendants filed a demurrer, and it is upon the judgment of the Court below overruling the demurrer that error is assigned, and the question now comes before this Court. Our judgment is invoked upon the facts admitted by the demurrer as they are alleged to exist in the bill; and one main distinguishable criterion in all cases of this character is the intention of the parties in using the similarities of trade-marks claimed by another, which by the pleadings is admitted to be "to take advantage of the reputation" of the manufacture of Zeilin & Company. The language is "that the said Ellis is imitating the form and style of the package and wrapper used by your orator as aforesaid to take advantage," etc.

It will be noticed that the bill does not charge Ellis with making the same article. In fact, the exhibits negative this idea, for Ellis publishes his article as prepared only by him, and Zeilin & Company say their preparation is prepared only by them. Again, Ellis calls his (immediately under a

large symbol not in the other label) Dr. A. Q. Simmons' Genuine Liver Medicine, the other is "Dr. Simmons' Liver Regulator or Medicine." The type used is different, the arrangements of words different; classes of disease different in part. And upon a fair view of the trade-mark on these packages we are not satisfied that they appear to imitate Zeilin & Company's medicine, but rather to set up an original and distinct claim to the medicine put up and sold by Ellis.

2. In matters of trade-mark we lay down the rule to be, that, in order to authorize the interposition of a Court of Equity, the title to the use and enjoyment must be clear and unquestionable, and will be adjudicated only upon the rights of parties before the Court and as between their conflicting claims, and not with a view to the guardianship of the public upon the merits or demerits of *nostrums*, except in cases where injury to the public health or morals enters into the ingredients of the allegations.

And in matters of medical agents, whose effects are upon the human system, any man has a right to compound his liver medicine or other medicine and publish all the diseases within its range of cure, no matter how many predecessors or precedents he may have had, and to put it in such bottles or packages as he pleases, so long as he does not set up the right to another man's property or advertise for sale another man's wares, and does not use *his* invention with *its* prints, packages and symbols as his own. As soon as he does this he is liable in law, and will be restrained. We recognize the property in trade-marks or business, but do not recognize that every person is restrained from putting his own in two ounce bottles or four ounce packages, and printing the diseases it will cure, because somebody else has done so.

The line is drawn around the invention and its devices, only so far as to prevent another taking it and appropriating it. Similarity of disease in its classification or of symptoms in their various phases are the property of all.

We do not think there was equity in this bill on the mere question of similarity in the trade-marks. But as the demurrer admits that what was done was done, intentionally to take advantage of the reputation of his "Simmons' Liver Medicine," we cannot hold the Judge below erred in retaining the bill for a hearing to let the whole matter be determined upon its merits.

Judgment affirmed.

G. M. LOGAN, trustee, plaintiff in error *vs.* W. P. GOODALL, executor, and his tenants, defendants in error.

(LOCHRANE, C. J., said he had been consulted by and had advised Logan, but was not employed. By request, he presided.)

Where on the trial of an action of ejectment for a lot in the city of Macon, in favor of George M. Logan, Trustee for Mrs. A. E. McLaughlin, it appeared that in 1850 McLaughlin and his wife, on their marriage in Richmond county, entered into a marriage contract, in which McLaughlin covenanted with John T. Lamar, who was a party to and signed the deed, that his wife should have a separate estate in certain real and personal estate belonging to her before the marriage; that subsequently, in 1836, the city lot, of which the property in dispute is a part, was leased, with the proceeds of the separate estate for nine hundred and ninety-nine years from the city of Macon; that a deed of lease was taken to John T. Lamar, Trustee for Mrs. E. McLaughlin; that in 1842 Lamar died; that in 1842, McLaughlin conveyed the lot to White & McLaughlin, partners, McLaughlin being one of the firm in consideration of one dollar; that in 1849 the whole lot was sold as the property of White, at sheriff's sale, under an execution against White only; that on the day of the sale the purchaser reconveyed the lot to White; that McLaughlin saw the advertisement of the sale, and was in the city on the day of the sale, but was not present at the sale; that the defendants, through several intermediate purchasers, hold a portion of the lot, under the title from White as the owner of the whole; that they had no notice of the marriage settlement, or of the facts that the lease was paid for with the separate funds of the wife, and have in good faith made valuable improvements upon it.

1. That, under the marriage settlement, Lamar became, by operation of law, trustee for the protection of the separate estate, and if the

lease was paid for by the separate funds of the wife, Lamar was in equity a trustee for her sole use of the lot conveyed in the lease; that at his death the trusteeship became vacant, and the Judge of the Superior Court might legally appoint a successor who could maintain ejectment on the title.

2. That, although, by the law as it stood before the adoption of the Code, the deed "to Lamar, trustee for Mrs. McLaughlin," did not contain any words sufficient to exclude the marital rights of the husband, yet, as between the wife and her husband, or purchasers from him with notice of the wife's rights, or between her and wrong doers, marital rights did not in fact attach, and her trustee may, as against him, or purchasers from him with notice, or mere wrong-doers, maintain ejectment for the lot.
3. That inasmuch as the deed to Lamar was to "Lamar, trustee for Wm. McLaughlin," it did not upon its face, as the law then was, exclude the rights of the husband, and persons dealing with him had a right to treat him as the true owner, and any purchaser from him or under him, without notice of the equitable rights of the wife, if the purchase be *bona fide*, will be protected against her rights.
4. Under the deed from McLaughlin to White & McLaughlin, only an undivided half of the lot passed to White and the purchasers at the sheriff's sale, and those holding under that sale, hold only the interest of White; nor does the fact that McLaughlin saw the advertisement and was in the city at the time, but was not present at the sale, estop the wife or her trustee from setting up against said purchasers, her right to the other undivided half of the lot.
5. One tenant in common may bring ejectment against his co-tenant, if the possession of the co-tenant be adverse; if a recovery is had the plaintiff will be put in possession as tenant in common, leaving to the parties the right, by writ of partition or by bill in equity to settle any equities there may be between them as tenants in common.

See concurrence of WARNER, J.

Trusts. Marriage Settlements. Ejectment. Before Judge COLE. Bibb Superior Court, May Term, 1870.

This was ejectment for part of lot number fifteen, in the western range of two acre lots in Macon, by Doe, upon a demise from John T. Lamar, as trustee of Mrs. E. W. McLaughlin, for forty years from the 1st of January, 1842, against Roe, casual ejector, and William P. Goodall, as executor of Robert P. McEvoy, as tenant in possession. The defenses were, not guilty, and prescription of seven years.

Plaintiff's counsel read in evidence a marriage settlement made in Richmond county, Georgia, on the 28th of December, 1830, between Alexander R. McLaughlin, of Bibb county, Elizabeth W. Bugg, of Richmond county, and John T. Lamar, of Bibb county, signed by the three, recorded in Richmond county, on March the 22d, 1831, and in Bibb county, on the 2d of Febuary, 1870, the body of which was as follows:

Whereas, Samuel Bugg, late of the county of Richmond, and State aforesaid, the father of the above named Elizabeth, was in his life-time, and at the time of his death, seized and possessed of a good estate, real and personal, to a distributive share of which the said Elizabeth was, and is, entitled, and upon a division of which estate, after the payment of debts, there fell to the share of said Elizabeth the following negro slaves, to-wit: Billy, Joe and Sallie, and an interest in the swamp plantation called Egypt, below Augusta, being one-fourth; and whereas, a marriage is intended shortly to be had and solemnized between the said Alexander R. and said Elizabeth W, it is agreed by and between the said Alexander and Elizabeth, that if said marriage shall take effect, then, notwithstanding the said marriage, said Alexander R., his administrators, executors or assigns, shall not nor will intermeddle with or have any right, title or interest, either in law or equity in or to any part of the property before described as belonging to the said Elizabeth, or in or to any part or portion of property to which the said Elizabeth is now entitled, or interested in either at law or in equity, whether in possession or expectancy as one of the distributors of her late father, Samuel Bugg, or in any other manner whatever. Now this indenture, witnesseth that, for the making the said agreement good, and effectual in the law, and for the keeping and preserving the property aforesaid, to and for the separate use of her, the said Elizabeth, and so that the same shall not be in the power or disposal of the said Alexander R. McLaughlin, or *liable* to the payment of any

of his debts or any encumbrances; he, the said Alexander R., doth for himself, his exectors and administrators, and for each and every of them, covenant, declare, and agree to and with the said John T. Lamar and his executors and administrators, by *these presents*, that notwithstanding the said intended marriage shall take effect; the property of the said Elizabeth shall be accounted, be reckoned, and taken as a separate and distinct property and estate from the property and estate of him, the said Alexander R., and in no wise liable or subject to him or to the payment of his debts, or either of them, but shall be ordered, disposed, and employed to such person, or persons, and to such use or uses and intents and purposes, and in such manner and form as is hereafter mentioned and declared; that is to say, that all the separate and distinct estate before declared and allotted for the said Elizabeth, shall be had, taken, held, possessed, and enjoyed by the said Elizabeth, and further, that the said Elizabeth may dispose of the said property by her last will and testament. But in event of there being issue of the marriage intended to be solemnized between the said Alexander R. and Elizabeth, and the said Elizabeth departing this life without will, or making other disposition of said property, then, and in that event, the same shall go to and rest in the child or children of the said Elizabeth and their legal representatives in equal degree. And if there be no child, or children, or legal representative of children, then, and in that event, the same shall go to and vest in said Alexander McLaughlin, and that it shall and may be lawful to and for the said John T. Lamar, at any time from and after the said intended marriage shall take effect, to commence any action, or suit in law, or equity in the name or names of said Alexander R. and Elizabeth, his intended wife, against any persons for the recovery of any sum or sums of money due or to grow due to the said Elizabeth on the said separate estate of her, the said Elizabeth as aforesaid. And that the said Alexander R. shall and will avow, justify, and maintain all lawful actions

and suits that shall be commenced for recovery of the premises, and will as often as desired thereto by the said John T. Lamar, join with the said Elizabeth, his now intended wife, in any receipts, release, discharge or assignment necessary to be given on receiving any of the money due, or to grow due to the said Elizabeth, as aforesaid. And also that the said Alexander R., his executors or administrators shall not nor will, at any time or times hereafter, do, commit, suffer, or cause to be done or committed, or suffered, any act, matter, or thing whatever, whereby, or wherewith, or by reason, or means of which the said Elizabeth shall or may be in any way frustrated or hindered in the having, holding and enjoying her said estate for her own separate use. Provided, also, and it is declared, concluded and agreed between the parties to these presents that the said Alexander R., his executors and administrators shall, from time to time, and all times hereafter, be indemnified and saved harmless out of the separate estate of the said Elizabeth, of, and from all manner of costs and charges, damages or troubles that he or they shall or may sustain, incur or be put unto by reason, or means of his, the said Alexander R. joining or being made a party in any action or suit for recovering any part of the said separate estate of the said Elizabeth, or joining or being made a party in any receipt, release or assignment to be made and given upon receiving any part of the separate estate of her, the said Elizabeth, as aforesaid, or on any other account, whatever, or relation to the said separate estate.

They next read in evidence a lease made the 11th July, 1836, by the Mayor and Council of Macon to John T. Lamar, as trustee for Mrs. McLaughlin, recorded February 1st, 1870, the body of which was as follows: "The said Mayor and Council of the city of Macon, for, and in consideration of the sum of $90 00, of the rents, provisos and agreements herein reserved and contained, which, on the part of the said John T. Lamar, trustee, as aforesaid, his executors, administrators and assigns, are to be paid done and

performed, and by virtue of the acts of the General Assembly of the State of Georgia, authorizing and empowering the said Mayor and Council to sell and dispose of the said property, domain, land, or lots, to the said city belonging or appertaining, by lease for years or in fee simple, and of the ordinances of the said City of Macon, made in pursuance of said acts, have devised, leased, let and to farm let, and by these presents, do devise, lease, let and to farm let, unto said John T. Lamar, trustee, as aforesaid, his executors, administrators and assigns all that certain piece or parcel of land known and distinguished in the plan of the City of Macon, by two acre lot number fifteen, in the Western Range of two acre lots containing two acres, more or less. To have and to hold the said demised premises, with appurtenances unto the said John T. Lamar, trustee, his executors, administrators and assigns from the day of the date hereof for, and during the full term of nine hundred and ninety-nine years next ensuing, and fully to be completed, and ended, the said John T. Lamar, trustee, his executors, administrators or assigns yielding and paying unto the said Mayor and Council of the City of Macon, or their assigns, on the first day of April in each and every year ensuing these presents, during the continuance of said term one copper coin; (provided the same be lawfully demanded,) and also paying and discharging from time to time, and at all times during the continuance of said term all taxes which may be levied or assessed of, or upon the said demised premises by the corporation of Macon, the State of Georgia or other lawful authority. And the said, the Mayor and Council of the City of Macon, for themselves and their successors in office, do covenant and agree to, and with the said John T. Lamar, trustee, his executors, administrators, and assigns that he the said John T. Lamar, trustee, his executors, administrators, and assigns paying the same yearly rent above hereby reserved and also paying all taxes upon said demised premises as above herein provided, shall and may lawfully, peaceably and quietly, have, hold, use,

occupy, possess, and enjoy the said demised premises with appurtenances, and every part and parcel thereof for and during all the said term of nine hundred and ninety-nine years hereby granted, without any let, suit, hindrance," etc.

It was admitted that said Mayor and Council had authority to make said lease. It was shown that John T. Lamar died in 1842. It was shown that, upon petition of Mrs. McLaughlin and her husband and children, George M. Logan was, on the 16th of April, 1869, by the Chancellor of Bibb county, duly appointed trustee, to succeed said John T. Lamar, with his powers, rights and duties as set forth in said papers, and that Logan accepted the trust.

Plaintiff then introduced A. R. McLaughlin as a witness, who testified that he intermarried with Mrs. Elizabeth W. McLaughlin, (then Bugg,) in Augusta, Richmond county, Georgia, in 1830; that at that time he resided in Macon, Georgia, and has resided in Macon up to October, 1866, and in the county of Bibb, near Macon, ever since. That his wife had a considerable separate estate inherited from her father, consisting of land, negroes, and other property and money, which was in the possession of himself and wife and trustee. And that the property mentioned in the deed from the City of Macon to said Lamar, trustee, was paid for out of proceeds of the separate estate of Mrs. Elizabeth W. McLaughlin, under the marriage contract. That said trustee was indebted to her for negro hire, and paid about one-half of the purchase-money in that way, and that he (witness) paid the remainder out of what he was indebted to the estate; that he was always indebted to the estate, though he had not kept her funds separate; that the south-east quarter of lot fifteen is the premises in dispute in the case, and contains one-half acre, and that said Theophilus Stewart was in possession thereof, at the commencement of this suit. There is now and was then, a house on the lot in dispute, and the same was and is enclosed with a fence. The premises in 1867, and since, have been worth for rent, an average of

$200 00 to $250 00 *per annum.* In 1843 the witness executed a deed individually to the partnership of White & McLaughlin, composed of witness and Joseph A. White, to lot number fifteen and other property, and has not since seen the deed.

Plaintiff offered to prove by said witness, McLaughlin, and counsel for plaintiff stated in their place that they expected to prove by him, to-wit: 1st. That the deed read in evidence to the jury by defendant, and executed by said witness to White and McLaughlin, was without any consideration, and that the one dollar purporting in said deed to have been paid as a consideration, was not in fact paid. 2d. That at, and before, the time said A. R. McLaughlin made said deed of conveyance of said lot to White and McLaughlin, as proven by defendants, that said White well knew and had notice that said lot was the separate estate of Mrs. E. W. McLaughlin under said marriage contract. This was objected to by counsel for defendants as irrelevant testimony, unless plaintiffs proved that McEvoy, and all intermediate purchasers between him and said White had similar knowledge and notice; and said plaintiff, having been called on by the Court, stated that he had nothing additional to offer as to that matter. Whereupon the Court sustained said objection and refused to allow plaintiff to make the proof aforesaid.

Here plaintiff rested. Defendant moved for a non-suit, but the motion was overruled. Defendant put in evidence the following deeds: A deed conveying said lot number fifteen from A. R. McLaughlin to White & McLaughlin (composed of himself and J. A. White,) made the 23d of May, 1843; a sheriff's deed made in March, 1849, whereby said property was sold under a sale on a *fi. fa.* against said White *et al.*, as the property of said White to Thomas A. Brown; a quit-claim deed from said Brown to White, made the 4th of January, 1857; a deed from said White to E. L. Strohecker, made the 1st of July, 1852, to one-half interest only;

a deed from said White's executor to Peter Stubbs, for the other half interest, dated the 15th of March, 1854; a deed from Stubbs to James A. Ralston, for his half, dated the 6th of June, 1859; a deed to part of the lot from Ralston to P. T. Bartram, made the 29th of April, 1862, and last, a deed from Bartram to R. P. McEvoy for that part sued for, dated the 1st of June, 1863.

Defendant then introduced W. B. Johnston, who testified that some time, from 1837 to 1840, McLaughlin was engaged in issuing individual change-bills; that he used the blanks of the Hawkinsville Bank, the issue to be redeemed at the Ocmulgee Bank; that said White being his partner was interested in the change-bill issues. He understood from both White and McLaughlin that they were going to invest the proceeds of the change-bills in city property, or were going to buy city property for security for redemption of said bills. He remembers to have heard that lot fifteen, of which the disputed premises is a part, was one of the lots that was to be purchased; that he heard a conversation between White and John T. Lamar, in which Lamar stated that this lot, No. fifteen might, or could be put into the batch of property designed for that purpose of indemnity. He remembers these conversations more fully on account of an understanding at one time that the property was to be sold to witness in satisfaction of an execution which he held against White, which agreement White's agent afterwards, while White was in the Mexican war, refused to carry out. On cross-examination he stated that the transactions he testified about all occurred *after* the partnership of White & McLaughlin was known to the public; that a secret partnership between them was before known to witness and Lamar; that he did not know that the arrangement as to the purchase he heard White and Lamar speak of was ever carried out, or that any money was paid for that purchase; that he never saw any paid, but that after the conversations between Lamar and White as stated, Mr. Lamar recognized the property as that of White and

McLaughlin, and that afterwards White had the control of it.

Plaintiff, in rebuttal, introduced A. R. McLaughlin, who testified that he never knew or heard of any such arrangement as that testified to by witness, W. B. Johnston, and none such was ever made so far as he, McLaughlin, knows or *believes;* that the public partnership between him and White never commenced until 1842; that there was a secret partnership between himself and White, and that began in 1839, while White was Cashier of the Ocmulgee Bank. The change-bills mentioned by witness, W. B. Johnston, were issued by him in 1842, and none were issued before that time.

On cross-examination, he stated that he was not present when the premises in dispute were sold at sheriff's sale as White's property, but that he saw the advertisements and was in Macon at the time, but did not attend the sale. Plaintiff then read from the answers of Mrs. E. McLaughlin (plaintiff *cestui que trust*) to interrogatories in the case:

1st. That she first learned she had a title to the lot fifteen in western range of two acre lots, about two and a half years ago.

2d. Witness' little son, in playing with a lot of old refuse papers which had been thrown aside as worthless, handed out this package of papers, and then my attention was called to them. On examination, I found they were the papers connected with my title to the abovenamed lot. This was my first knowledge that any such papers existed, not knowing of the existence of such papers until they were discovered. She cannot say how they were lost. Her answers to third interrogatory was ruled out, which is copied and set out in the rule *nisi* for a new trial.

Dr. E. L. Strohecker, sworn by defendant, said he bought from J. A. White the undivided half of lot fifteen, as is expressed in his deed at date thereof; paid the considerations specified, which was the full value at the time, or over; that he had known lot fifteen, western range, for several years, per-

haps since 1848; that White had been in possession or control during that time, and he knew of no other claims; that after Ralston became owner of an undivided half, he and Ralston divided or parted the lot, he taking the northwest half, lying on College street, and Ralston the southeast half, fronting on Orange street; that the lot was unimproved up to the time he sold, not enclosed.

On cross-examination, he stated that when he took the deed from White he did not inquire about the back deeds; was satisfied with J. A. White's deed; that White wanted money, and he bought the land to accommodate White.

Defendant next swore William P. Goodall. He swore he came into possession of the premises in dispute under Bartram's deed to R. P. McEvoy, as executor of the latter; that he put the improvements, or building, upon this part of lot fifteen in July, 1867; that they cost about $1,500 00; that the average value of rent since improved was about $275 00 per annum.

Next for defendant was Philo T. Bartram, who stated that he bargained the part of lot fifteen containing the premises in dispute in the fall of 1862, though he only took a deed for this part in 1863 (see deed;) that the lot was not enclosed when he bought it; that he enclosed it with a fence in the fall of 1862; that the lot with the improvements was worth about $2,500 00; that he got no chain of titles; only received the Ralston deed to the said portion of Ralston's half.

Plaintiff's counsel requested the Court to charge the jury as shown by the motion for a new trial as hereinafter stated. The Court charged the jury as follows:

This is an action of ejectment by George M. Logan, as trustee for Mrs. McLaughlin, to recover a lot of land in this county. The action is against Mr. Goodall, as executor of Mr. McEvoy. These are the real parties in the case, and you are to determine from the law as I shall give it to you, and the evidence applied to the law, whether the plaintiff is entitled to recover. In actions of ejectment I charge you

the law to be that the plaintiff must have a perfect title in himself. It is not necessary that the defendant should show title in himself, or have any title. The plaintiff must recover on the strength of his own title. Now, has the plaintiff shown title in himself as trustee for Mrs. McLaughlin? The only title offered by plaintiff to show title in himself is a deed of lease from the City of Macon, dated 11th July, 1836, to John T. Lamar, trustee for Mrs. McLaughlin, for the premises in dispute. The deed does not convey the land to Lamar, trustee for Mrs. McLaughlin, for her sole and separate use, and if you believe from the evidence that she was a married woman at the time, then, by operation of the law, the title to the property vested in her husband; and if you believe from the evidence that A. R. McLaughlin was her husband, no title ever did or could rest in Mr. Lamar to the exclusion of Mr. McLaughlin's marital rights, and no title ever did or could vest in Mr. Logan to the exclusion of her husband's rights; and if so, he is not entitled to recover, and your verdict should be for the defendant; and again the plaintiff relies upon an ante-nuptial marriage contract entered into in 1830, between Mr. and Mrs McLaughlin and Mr. Lamar, securing to Mrs. McLaughlin all her property received from her father's estate, or from any other source. This contract secures the property thus coming to her from her father's estate or otherwise to her sole use. An Act of the Legislature of Georgia, passed in 1847, requires all marriage contracts made prior to that time, to be recorded within twelve months from the passage of the Act in the county of the husband's residence. If the evidence satisfies you that the residence of Mr. McLaughlin was in Bibb county at the time of the execution of the contract, and the marriage contract was not recorded in Bibb county within one year from the passage of the Act, then I charge you that, if Mr. McLaughlin sold the land to a *bona fide* purchaser without any notice, actual or constructive, of the marriage settlement, the purchaser got a good title notwithstanding the marriage con-

tract. This is by operation of the Act of 1847. The Act requires that such marriage settlement as this should be recorded within twelve months from its passage in the county of the husband's residence, and it declares that, if it is not so recorded, then the marriage settlement shall not be of any force or effect against a *bona fide* purchaser without notice. If the marriage settlement had been recorded as required by law, the registry would have been sufficient notice to the purchaser. But the record in Richmond county is not notice to a subsequent purchaser. The notice may be actual or constructive. Actual notice is when the purchaser knows actually that there is a marriage settlement that secures the property to the wife. Constructive notice is sufficient if it would excite apprehension in ordinary minds, and prompt inquiry into the actual condition of things. Now, if you believe from the evidence that Mr. McEvoy had such notice, or if you believe that the persons under whom he claims had such notice, then on this branch of the case the sale by her husband is null and void, and the purchaser took no title. But if the purchaser did not have such notice, then he took a good title against all the world, notwithstanding the marriage contract. These principles have been so held by the Supreme Court, and is the law governing this case. To recapitulate: If the evidence satisfies you that the deed from the city to Lamar did not give the lot here sued for to the sole and separate use of Mrs. McLaughlin, then upon the execution of the deed, it vested in her husband by his marital rights, and the plaintiff is not entitled to recover.

And secondly, if Mr. McLaughlin sold this land to a *bona fide* purchaser without notice, actual or constructive, of the marriage settlement, and the present defendant, or his testator, Mr. McEvoy, bought it *bona fide*, and without any such notice, then the plaintiff is not entitled to recover. This you must determine from the evidence, and find your verdict accordingly. But if you believe from the evidence that the deed from the city to Lamar was for the sole and separate

use of Mrs. McLaughlin, then the title did not vest in her husband, but in her trustee, and he is entitled to recover. You will have the deed before you, and you must determine from that. Or, if you believe from the evidence that Mr. McEvoy, or those under whom he claims, had notice at the time they purchased of the marriage settlement, then they got no title, and plaintiff is entitled to recover. This you must determine from the evidence. You cannot infer it without proof.

If you find for the plaintiff, you will say: "We, the jury, find the premises in dispute for the plaintiff." And if you find the plaintiff entitled to rents for the use of the place, then ascertain how much, and if you find the improvements equal to the rents, then you cannot find anything for rent.

If you think, under the law and evidence, that plaintiff is not entitled to recover, then say: "We, the jury, find for the defendant."

The jury found for the defendant. Plaintiff's counsel moved for a new trial upon the following grounds:

1st and 2d. Because of the rejection of said evidence of A. R. McLaughlin.

3d. Because of the rejection of the following answer of Mrs. McLaughlin to the third interrogatory: That most of the time for twenty-three or twenty-four years previous to this date she (the witness) has been in indigent circumstances and part of the time really in a state of poverty. In rebuttal of the insinuation that she has practiced a fraud upon the parties who have bought and improved the lot number fifteen above referred to, she says that being in entire ignorance of her having any title or interest in the lot, she had no inclination to practice any fraud nor any inducement to practice any, and that she has done nothing in regard to the above mentioned lot, either with a view to establish her title or to ignore the title of any one else. If she had had any knowledge of the fact that she had any interest in lot number fifteen, she certainly would have made an effort long

since to establish the title and obtain the possession of the property, as she has stood in great need of this and which this property might have afforded her, and the said Court ruled out the same, and which ruling the plaintiff claims was erroneous. The Judge certified that he ruled out this answer because no offer to assail Mrs. McLaughlin's character or motives had been made.

4th. The Court erred in refusing to give in charge said third request asked for, and which was, and is as follows, to-wit: If Lamar (the trustee,) bought the property in dispute, and paid for it with the separate estate of Mrs. McLaughlin, then a complete and perfect equity vested in her, and her present trustee can maintain ejectment.

5th. Because the Court erred in refusing to give in charge the fourth request of the plaintiff, and which was and is as follows, to-wit: If the Court shall hold that the words in the deed from the City of Macon—"Lamar, trustee for Mrs. E. W. McLaughlin"—are merely *descriptio personæ*, and that the legal title by that deed vested in Lamar, that yet, if he paid for it with her separate estate her equity is perfect, and her present trustee can maintain ejectment, notwithstanding the naked legal title may yet be in the estate of Lamar.

6th. Because the Court erred in refusing to give plaintiff's fifth request, and which was, and is as follows, to-wit: That no marital right of the husband having attached to her property under the marriage contract, then such marital right cannot attach to property bought by her trustee and paid for out of the separate estate.

7th. Because the Court erred in refusing to give the sixth request asked, and which was, and is as follows, to wit: And further, on the last point, if the Court holds that the city deed conveyed title to Lamar *as* trustee, but that it contains no words excluding the marital rights, the Court will then charge, that as the husband by the marriage contract relinquished all claim to, and covenanted never while she lived

to take any title to her separate property, therefore no marital right attached under the city deed.

8th. Because the Court erred in refusing to give the latter clause of the seventh request, which clause was, and is as follows, to-wit: That if the evidence shows that the premises in dispute were vacant, not in the occupancy of any one until the fall of 1862, and that the same have been occupied under paper title only since some day in June, 1863, then neither the clause of the Statute of Limitations nor prescription will protect defendant.

9th. Because the Court erred in refusing to charge the eighth request of plaintiff, which was, and is as follows, to-wit: That although the marriage contract was not put on record under the provisions of the Act of 1847, that fact cannot affect the validity or invalidity of a deed made in 1843 by A. R. McLaughlin. That no marital right having attached under the marriage contract, or by the deed from the city, McLaughlin had no title to convey; and as to any purchasers prior to the Act of 1847 from him or under him, they got no title from and under him; and that purchasers after the Act of 1847 having bought under, and claiming title through or from one who had no title, were not *bona fide* purchasers under the laws of the land.

10th. Because the Court erred in refusing the ninth request of plaintiff to charge, which was and is as follows, to-wit: That defendant did not get a full title through the deed to White and McLaughlin unless he proves title from both those purchasers; that a deed from White alone, or a sheriff's deed purporting to convey the title or property of White only, could give title to only one-half of the land, and an undivided half unless McLaughlin was present and assented; or by some positive act misled the buyer; that although he knew of the land being advertised, the law did not oblige him to go to the sale and notify buyers of his claim or title. Because each section of the charge as given was wrong, and because the verdict was contrary to law,

strongly and decidedly against the weight of the evidence, etc.

The Judge certified that he declined to charge the third and fourth requests because they were unauthorized by the evidence, and that he did charge the seventh request. He refused a new trial, and error is assigned on each of said grounds.

JOHN RUTHERFORD, B. HILL AND S. HALL, for plaintiff in error. 1st. John T. Lamar was, by the settlement, constituted trustee for Mrs. McLaughlin, although he was not styled trustee by the instrument: 2 Spence Eq. Jur., 20; and he had, if not directly, at least by necessary implication, all the power and estate vested in him which was essential to the performance of the office: Lewin on Trusts, 249, *et seq.* The husband's covenant to allow the use of his name in the bringing of suits, etc., did not limit and restrict, but enlarged the powers of the trustee. 2d. Upon the death of John T. Lamar, the trust under the provisions of this deed did not devolve on his personal representatives: Lewin, 266, *et seq.;* there is no such purpose expressed in the deed, nor is it to be inferred therefrom that such was the intention of the *cestui que trust:* 2 Spence Eq. Jur., 38. 3d. Neither could the trust under the circumstances of this case, upon the death of Lamar, devolve upon McLaughlin, the husband of the *cestui que trust*: Lewin, 260, 268, 269, 44, 121, 124, Note (X), 694; 2 Spence Eq. Jur., 507; and this is true notwithstanding what was said *obiter* and *arguendo* by the Judges, in Boston & Gunby vs. Cummings, 16 Ga., 111; 25 Ga., 283. The rule is properly laid down in Fears vs. Brooks, 12 Ga., 197; Lewin, 279. The trust, then, could have devolved upon no one but Lamar's legally appointed successor, who is the plaintiff in error: Picquet vs. Swann, 4 Mason's R. 4th. The deed from the City Council of Macon to Lamar, trustee, his executor, etc., under the circumstances vested the title in him as trustee of Mrs. McLaughlin,

and not in his individual right, because the land conveyed thereby was purchased with her funds, and a breach of trust cannot be imputed to him from this evidence alone; and further, because the transaction was executory and not executed: 2 Spence, 38; Lewin, 265; 2 Spence, 204, 203; Taylor vs. Plumer, 4 M. & Sel., 562; Lewin, 756. That this is an executory trust, see Adams' Eq., 40, 41, 42; 2 Spence, 128, *et seq.*, and is therefore to be construed and carried out according to the intention of the party, *ibid;* Crawford vs. Brady, 35 Ga. R., 190; Johnson vs. Hines, 31 Ga. R., 570. 5th. In any event, Mrs. McLaughlin has a perfect equity to this land, and on this she may maintain ejectment: Miller vs. Swift, 39 Ga. R., 91; Peterson vs. Orr, 12 Ga., 464; Pitts vs. Bullard, 3 Kelly, 5; 29 Ga., 490; and whether Logan is a regular trustee or not, Mrs. McLaughlin, who is a married woman, may enforce her rights by the use of his name: Revised Code, sec. 1764. 6th. McLaughlin, in making sale of this land to White and McLaughlin, did not act as trustee; he conveyed only his own title, which was no title at all; his title was a nullity, and no one claiming under him had anything on which to found even a color of title; neither he nor his vendee, nor any subsequent purchaser from them, was in possession of the land until the end of the year 1862. During this entire period Mrs. McLaughlin was under coverture and had no trustee, nor until recently had she any notice of her interest in the premises, and, therefore, is not barred either by the Statute of Limitations, or by prescription: Scott, administrator, vs. Haddock and wife, 11 Ga. R., 258. 7th. The sale by McLaughlin to himself and White was a sale with notice, and a fraud: 2 Spence, 760; and there were also many circumstances of a striking and unusual character to put *mesne* conveyancers upon notice; as, for instance, the nominal consideration expressed in the deed from McLaughlin to White and McLaughlin, the sale of White's interest by the sheriff, and the purchase by Brown and re-conveyance by him to

White for a merely nominal consideration; the gross negligence under so many suspicious circumstances, and the failure to make inquiry, will charge the parties with notice: 2 Spence, 754, 757, 758. 8th. The Court erred in holding McLaughlin incompetent to prove that the deed from him to White and McLaughlin was without consideration: Rev. Code, sec. 3798. In this suit McLaughlin was not estopped by his deed to himself and White to speak the truth: 1 Starkie, 99, 460. There was manifest error in rejecting evidence to show that White had notice of Mrs. McLaughlin's equitable title, unless she would state that she expected to bring home notice to subsequent purchasers under him. 9th. The Court committed error in applying the provisions of the Act of 1847, requiring the registry of marriage agreements (Cobb's New Dig., 180) to the sale and transfer of the premises in this case. The Act, by its terms, does not embrace sales made and completed prior to its passage, nor does it declare the settlement void where the sale is made by any other person than the husband, but on the contrary expressly excludes such transactions; it is not to be construed retrospectively, or to have a retroactive effect: Smith's Comm., sec. 533; 16 Ga., 109; Park on Dower, 24; 14 Ga. R., 77; 15 *ib.*, 96; 34 *ib.*, 386; Rev. Code, sec. 7; 47 Ga., 423, 380. It is not to be extended beyond its letter: 16 Ga., 111; 25 Ga., 283; 20 *ib.*, 223; 32 *ib.*, 163; 35 *ib.*, 192; 28 *ib.*, 170. Prior to the passage of the Act, any sale made by the husband was void, and there is no provision in the Act for the confirmation of such sales, and none whatever protecting the rights of parties holding under the feofee of the husband, who became such prior to the passage of the Act. Validity can only be given to avoid act by the transcendant power of Parliament: Comyn's Dig. Confirmation, (D. I,) (D. 5); Touchstone, 311, 312, 314; 2 Peters R., 662. That the feofee of the husband prior to the passage of the Act, and his conveyance, was not designed to be protected by the Act, additionally that he and the husband are not one and the same person: 25 Ga. R., 282; 33 *ib.*, 231; *ib.*, 565.

WHITTLE & GUSTIN, LANIER & ANDERSON, for defendant, furnished no brief to Reporter.

McCAY, J.

1. By the express terms of the marriage settlement, the intended husband contracts with Lamar, that the property of the intended wife shall be free from his marital rights, and this not only, as to the property she then had, but as to any property she might thereafter become entitled to, in any manner whatever.

By the rules of common sense, by our Code, and by the common law, this, *ipso facto*, makes Lamar the trustee of this settlement. Here is a *contract* with him for the *use* and *benefit* of the intended wife: See Rev. Code, sec. 2279–2281. The whole scope and design of the parties was to clothe him with the legal right to protect the wife in the separate estate provided for her. Whatever estate it is necessary for the trustee to have in order to carry into effect this triparte contract, the law confers upon him: Code, sec. 2314.

This was a mere naked trust, a confidence reposed. Ordinarily, the trustee is clothed with the legal estate, in terms, and his character, as trustee, grows out of the limitations placed upon his legal title. If he sell to one, with notice of the trust, or if he die, and the legal title pass to his heirs, in either case the trust follows the title. It is *imposed* by law upon the holder of the legal estate. The trust, or confidence of the grantor, is personal in the trustee and at his death, or upon his abuse of the trust, the Court of Chancery will appoint a new trustee and direct a conveyance of the title to him. The trusteeship of the heir of the trustee is not by virtue of the original appointment, but by virtue of his having the title, which the law couples with the same trust, as was attached to it, in the hands of his ancestor. In this case, there is no *title* conveyed to Lamar; he only takes such rights in, and power over the property, as is necessary to effect the objects of the settlement. At his death nothing

passed to his heirs, because, the confidence did not pass, and it was only, by virtue of that confidence and for the purposes of conforming to it, that Lamar had anything in the property.

We are inclined, too, to the opinion that, in general, in this State, it has never, at least for many years past, been considered, even when the legal title was expressly conferred upon the trustees, that the heir acquired any legal rights. The death of the trustee, has always been considered a termination of his interest, unless it was neceesary, for his own protection, that the interest should continue, as if he was in advance to the *cestui que trust*, etc.

Be this as it may, Courts of Chancery have always in cases of express trusts, exercised the power of appointing a new trustee, on the death of the appointee, of the parties, unless the trust be, by the terms of the deed, continued; and, even then, if, for any cause, it become necessary, in order to carry out the object of the trust. Hill, on Trustees, 190–194.

2. Previously to the Code, which alters the law in this particular, (Rev. Code, sec. 2281,) it was necessary, in order to create a separate estate in the wife, that distinct words, to that effect, be used or that the nature of the conveyance must be such as to exclude the marital rights of the husband. The mere creation of a *trust* for the use of the wife, by a stranger, was not sufficient: 19th Georgia, 577; 35th Georgia, 190.

3. Under this rule, the lease to Lamar, for the use of Mrs. McLaughlin, was to the use of *the husband.* There was nothing in the deed to *exclude* his marital rights, and he had the same right to dispose of it, to one who knew nothing of the title but what appeared upon the face of the paper, as if the deed had been in terms to him.

But, as is apparent from the record in this case, the husband never sold more than the undivided one-half of this property. It is true, he made a deed to the firm of which

he was one of two members, of the whole lot; but that still left him the owner of one undivided half. The sale, by the sheriff, of the lot, as the property of White, could only pass White's interest.

4. Nor could White himself, by his deed to anybody, pass more title than he himself had, to-wit, the one undivided half. So of all the deeds from White's vendees; they could not, by their mere multiplication or diversity, add to the title of White. In other words, as appears from this record, one undivided half of the original lot, as leased to Lamar, is still, as to title, just where it was at the date of the deed to Lamar. This defendant has no interest in it; his chain of title does not cover it; nor, with any consent of the owner of it, has it ever been separated from the other half. Why should not the trustee recover? He stands, by appointment of the Court, in the shoes of Lamar. Even as trustee, under the terms of the deed, the title to one undivided half is in him.

McLaughlin is not *asserting* his marital rights, under the deed. Why should not Logan, as trustee for Mrs. McLaughlin, answering as he does to the *very terms* of the lease, maintain ejectment in the title?

When it is replied that, under the law as it stood then, the effect of this lease was to create a title in McLaughlin, the answer is conclusive that, as between McLaughlin and his wife, the marriage settlement is good, though not recorded, and that if this lease was paid for with money belonging to her, as her separate estate, he is estopped by his own deed from setting up his marital rights.

We are not sure that even by the strict rules of the common law, the wife, or rather her trustee, would not, as against a stranger, have the right under such circumstances. But, under our Code, which allows a party, to go on at law, if he sees fit so to do, we think the right of Logan, as trustee for Mrs. McLaughlin, to maintain an action for the one undivided half is clear.

As to the undivided half sold to White, and by White, through various conveyances, to the defendants, White, if he had no notice of the truth, or the subsequent purchasers without notice, got a good title, they are presumed to have seen the deed to Lamar. Any lawyer would have told them that under that deed, as the law stood, McLaughlin had a right to sell. They were not bound to inquire further. They are innocent purchasers without notice, and no concealed equity, such as this unrecorded settlement, or the fact that the money of the wife paid for the lease, can be set up against them.

We have been unable to see what the sheriff's sale has to do with this matter—none of these parties claim under that. The fact that the whole lot was sold by the sheriff, as White's, to Brown, and by Brown reconveyed to White, did not and could not add to the original interest of White. The purchasers from him took his title and nothing more; and this is true, even if McLaughlin had so acted, at the sale, as to mislead the bidders. When White became the purchaser from Brown, the sheriff's sale became a mere episode, and the title in White was that he acquired under the deed of McLaughlin to the firm.

But it would be carrying the doctrine of estoppel very far, to hold one estopped from setting up a title to property sold as the property of another, at sheriff's sale, for the reason that he knew it was advertised to be so sold. There is no pretense that he was at the sale, or did anything to mislead the purchaser.

We have not discussed the question, so elaborately argued by the counsel, as to the effect of the failure to record this marriage settlement, under the Act of 1845, upon subsequent purchasers of property, which had been sold by the husband *previously* to the passage of the Act, because *this* property came into the community, under the deed to Lamar. *Prima facie*, this gave the right to McLaughlin to sell. The purchasers had a right to buy, and the case presented is one

of setting up a concealed equity in order to avoid an apparent legal right.

We do not decide the question we have alluded to. The argument for the plaintiff in error was very strong, but as the question is of great importance, and does not, as we think, arise in this case, under the view we have taken of it, we leave it for future consideration.

5. According to the view we have taken of this case, the plaintiff, as the record stands, is the owner of the one undided half of the land described in the lease to Lamar. A tenant in common may recover the whole from a stranger, or his undivided half from his cotenant, who is in adverse possession of the whole, or of any part of the whole: Rev. Code, 2283–2284. The effect of a verdict is not to dispossess the cotenant, but to put both in possession of the whole. What equities there may be, between them, based upon improvements made in good faith, and under a belief of a perfect title, or what equities there may be between the different purchasers, under the several deeds from White, we do not decide. But we simply say, that equity will not permit, injustice to be done, nor allow one tenant-in-common to get the benefit of improvements made, by his cotenant, under the honest belief that the title was wholly his.

Judgment reversed.

WARNER, J., concurring.

The deed from the city of Macon to John T. Lamar, as trustee for Mrs. McLaughlin to the two-acre lot did not create a separate estate in her, and the marital rights of her husband attached thereto, and vested the title in him by operation of law; the deed of A. R. McLaughlin, the husband, to the firm of White and McLaughlin, conveyed the one undivided half of said lot to White, the other undivided half was the property of McLaughlin. The sheriff's sale under an execution against White, and the sheriff's deed conveyed only such title as White had in the property, which

was only one undivided half thereof, and all the subsequent purchasers of that undivided half of the lot deriving their title through the original conveyance of McLaughlin to that undivided half of the lot, who were *bona fide* purchasers, claiming under that original conveyance of title by him, are entitled to be protected as such against the plaintiff's action to recover the land. The plaintiff's counsel requested the Court to charge the jury, "That defendant did not get a full title through the deed to White & McLaughlin, unless he prove the title from both these purchasers; that a deed from White alone, or a sheriff's deed purporting to convey the title or property of White only, could give title to only one-half of the land, an undivided half, unless McLaughlin was present and assisted, or by some positive act misled the buyer; that although he knew of the land being advertised, the law did not oblige him to go to the sale and notify the buyer of his claim or title." This charge, in view of the facts of this case, should, in my judgment, have been given to the jury. The fact that there was an outstanding title in McLaughlin to the undivided half of the land obtained in virtue of his marital rights, as the husband of his wife, who had *notice of the trust* and that the land was purchased with the *trust funds*, could not be set up as a defense to defeat the plaintiff's right to recover that undivided half of the lot in dispute, nor would the facts relied on operate as an estoppel to conclude the rights of McLaughlin to sue for the undivided half of the land, much less the plaintiff, whose trust funds paid for it, as against McLaughlin's title to the undivided half-interest in the two-acre lot conveyed by the city of Macon, who had notice at the time he acquired his title thereto, that the land was paid for with the trust funds of the plaintiff under the marriage settlement.

P. STOTESBURY, plaintiff in error, *vs.* R. S. LANIER, administrator, defendant in error.

An action was brought by the plaintiff against the defendant as the administrator of his intestate, to recover the value of certain goods which the plaintiff alleged had been appropriated and converted by the defendant's intestate. On the trial of the case, the plaintiff was offered as a witness for the purpose of proving the ownership and value of the articles sued for, the plaintiff's counsel stating that he would prove the bailment and conversion of the property by other testimony. The articles sued for had been locked up in a chest when delivered to defendant's intestate, but plaintiff did not state that he could not otherwise prove said articles or the value thereof, except by his own oath. The Court ruled out the testimony of the plaintiff on the ground that the defendant's intestate was dead:

Held, That the testimony of the plaintiff was properly ruled out by the Court as against the administrator, whose intestate was dead.

After the testimony of the plaintiff was ruled out by the Court, the plaintiff having no other evidence to make out his case, the Court allowed a verdict to be taken in favor of the defendant:

Held, That the allowing of the defendant to take a verdict was error; that the Court should have dismissed the case.

Party as witness. Practice. Before Judge COLE. Bibb Superior Court. May Term, 1870.

Stotesbury brought complaint against Lanier, as administrator of Cinthia Wimbish, upon an open account. The gist of plaintiff's cause was, that he had entrusted intestate with certain articles to keep for him, that they had been converted since her death, and that her estate was liable for their value. His counsel said he could prove the bailment and conversion otherwise, and offered the interrogatories of plaintiff to show the articles and their value, and his ownership of them. Because intestate was dead, his testimony was objected to and ruled out. Plaintiff's counsel offered no other evidence, and defendant's counsel took a verdict for costs, without objection by plaintiff's counsel.

A new trial was moved for upon the grounds that the Court erred in ruling out said evidence and allowing the de-

fendant to take a verdict. The motion was overruled. This is assigned as error.

A. O. Bacon, for plaintiff in error.

Lanier & Anderson, for defendant.

Warner, J.

The testimony of the plaintiff, offered on the trial, was properly ruled out by the Court, as against the administrator, whose intestate was dead. The plaintiff, having failed to make out his case, by any evidence which would entitle him to a verdict, the Court should have dismissed the same, and it was error, to allow the defendant to take a verdict in his favor.

Let the judgment of the Court be reversed.

Thomas N. Mims, plaintiff in error, vs. J. B. Ross *et al.*, defendants.

(Lochrane, C. J., did not preside in this case.)

1. Where there was a question of fact, as to whether there had been a formal gift by the father to the son, of real estate, with delivery of possession, under such circumstances as made the gift good against creditors of the father, and there was evidence on both sides, and the whole question of law and fact, was submitted to the Judge, this Court will not disturb his judgment, unless it be strongly and decidedly against the evidence.
2. To make a valid gift, there must be a present intention to give, and a complete renunciation of right, by the giver, over the thing given, without power of revocation, and a full delivery of possession as a gift, *inter vivos*, (R).
3. The legatee of a specific bequest of real estate, under a will, who has the assent of the executor to the legacy, has not such a title, as gives him a right to take a homestead therein, to the exclusion of the creditors of the testator.

New trial. Homestead. Gifts. Before Judge COLE. Bibb Superior Court. December, 1870.

Mims, an adult, applied to the Ordinary for a homestead out of certain lands. It was objected to, by the administrator, *cum testamento annexo*, of Mim's father, and by certain creditors of the father, some of whom held judgments against the father, upon the ground that it was the property of the father, and subject to pay the father's debts, etc. It was, on appeal from the Ordinary, pending in the Superior Court. The parties agreed to submit the law and facts to the Judge for decision. Mims showed that the land was given to him, by his father's will, as a specific legacy, and that, four or five days before his father's death, he sent for Mims, delivered him the keys to the premises, and the title deeds, saying, the premises were his; that he had given them to him in his will, etc. And he showed that, after his father's death, he treated the premises as his own, and that the administrator allowed him to do so. When this alleged gift was made, the father was abundantly able to pay his debts, without a resort to this land, but emancipation of slaves, etc., had changed that state of his estate.

On the other hand, it appeared, that the father stayed on the place, with the son, till he died, and the administrator said he allowed Mims to treat the place as his, only because, he supposed that he could pay all his debts, without a resort to that land. The Judge refused the homestead, and that is assigned as error.

JOHN RUTHERFORD, for plaintiff in error.

NESBITS & JACKSON, WHITTLE & GUSTIN, for defendants. What makes a gift: R. Code, secs. 2648, 2654, 2617, 2622, 2621. Possession of giver makes void as to creditors: R. Code, sec. 2620. Executor's assent to legacy can not divest lien of judgments: R. Code, secs. 2415, 2416, 3522. Adult

not entited to homestead in father's lands: 40th Ga. R., 437, 555.

McCay, J.

1. As to the question, whether this land was *given* by his father to T. N. Mims, during the life-time of the father, the jury has, under the facts, found against the gift. There was evidence on both sides and, under the rule, the verdict is not to be disturbed.

2. To make out the gift it would require proof of present intention to give—a complete renunciation of right, by the father, without power of revocation, and a full delivery of possession, as a gift, *inter vivos*. If the act were only, an earnest of the bequest in the will—a foretaste of the bounty, to be completed at the going into effect of the will, it was no gift to pass the title. We think there is evidence to sustain the verdict upon this point, and, as we have said so often, we will not disturb a verdict which there is evidence to sustain it.

3. Even if the legal title to this land was complete under the will, and by the assent of the executor it was not so complete as to relieve it from liens upon it, whilst it was the property of the father, at his death *all* his property became assets for the payment of his debts. The legatees *take* subject to this charge. The lien of these judgments followed the land into his hands, as they would have done into the hands of any *purchaser* from the father. Can he stand in a better position than a purchaser? It would be a violation of all principle so to hold. The assent of the executor is only effective, so as to bind himself. Even the executor cannot, by his assent, divest the judgment lien. He might, perhaps, do this by a public sale under the law, as an officer of the law, but it would be a strange doctrine to establish that an executor may, by his assent to a legacy, deprive the creditors of their interest in the assets.

Altogether, we see no error in this record. It would be

grossly unfair to permit the adult child of Mr. Mims to take the legacy under this will and leave the debts of the testator, and especially, judgment debt, which the law makes of the highest dignity, unpaid.

Judgment affirmed.

CUBBEDGE & HAZELHURST, plaintiffs in error, *vs.* O. F. ADAMS, defendant in error.

As a general rule, a Court of Equity will not interfere at the instance of a general creditor, before judgment, to set aside a voluntary conveyance alleged to have been made for the purpose of defrauding creditors, and restrain by injunction the sale of property held by the debtor under that voluntary conveyance as trustee or in his own right, on the ground of fraud, when the fraud alleged is the *execution of such voluntary conveyance without notice to the creditors.*

The original jurisdiction to grant, or refuse to grant, or to continue, or refuse to continue an injunction in an equity cause, is vested by the Constitution and the laws of this State, in the Superior Courts or in the several Judges thereof as regulated by law, who may, in the performance of that duty so devolved on them, exercise a sound discretion as to the granting or refusing an injunction, according to the circumstances of each case presented for their consideration.

This Court has no original jurisdiction to grant or to refuse an injunction, but is alone a Court for the *correction of errors* from the Superior Courts and City Courts; and unless it is manifestly apparent, from the record, that the Judge of the Superior Court has abused the discretion vested in him by law, either in granting or refusing to grant an injunction, there is no error which this Court can correct; and according to the facts as presented by the record in this case, there was not such an abuse of that discretion which the law has vested in the Judge of the Court below, in refusing to grant the injunction prayed for, as will authorize this Court to control it.

Inasmuch as the answer of the defendant was not filed under the order or process of the Court requiring the defendant to answer complainant's bill, but was voluntarily filed by him by way of showing cause against granting the injunction, it was to be considered by the Judge for what it was worth, in the shape in which he voluntarily chose to present it, and the complainants did not have the legal right to com-

plain of his action in regard to that matter; nor did the Judge err in refusing to allow the complainants to examine the defendant *orally* as a witness, on a motion to grant an injunction.

Equity Practice. Injunction. Before Judge COLE. Bibb County. Chambers. December, 1870.

On the 29th of November, 1869, Cubbedge & Hazelhurst filed a bill against Adams, making this case. They are bankers and brokers, and Adams is a cotton buyer; all live in Macon, Georgia. Adams has been one of their customers, for several years; has procured large advances of cash from them; has occasionally been largely in their debt, and, on such occasions, secured them against loss, as far as he could. Up to the close of their business relations, he always asserted his readiness, and ability to protect them against loss, for advances. From the foregoing facts, they placed implicit confidence in Adams' said assurances. Besides, Adams frequently exhibited to them his monetary *status*, to induce them to continue such advances, and to satisfy them of the safety in so doing. Up to the closing of their account, they believed that all Adams' property was pledged, as a security. for such advances. At the close of the cotton season of 1869–70, Adams owed them $9,308 97, and they paid a small amount for him since. Calling upon him for a settlement, they were astonished to find that he could not settle, and, upon inquiry, learned that Adams has conveyed all his property, with unimportant exceptions, to one Flanders, of Macon, his brother-in-law, in trust, for the wife and children of Adams, as appeared by a copy of the deed exhibited. The deed was made on the 22d of September, 1869; its consideration was "love and affection," and it conveyed to Flanders, in trust, for Mrs. Adams and her children, by Adams, *in esse*, or to be *in esse*, free from the disposition and contracts of Adams, with power in her to change the trustee, and with power in him to sell, with her written consent, without applying to any Court. It conveyed Adams' residence, and all his

household and kitchen furniture, part of lot number six, south half of number one, square number fifty-eight, numbers sixteen and seventeen, all in Macon, and twelve hundred and eighty acres of land in Missouri. This deed was recorded in Bibb county, on the 8th of March, 1870. This deed was made to defraud them, and other creditors, and it was withheld from record, that Adams might continue to get credit upon faith of his owning said property, and that, too, when, as they believe, he was insolvent. At the date of said deed, Adams owed them $7,900 00, and, without giving them any notice of his deed, he continued business with them without means to secure or pay them. Further, Flanders has been discharged, and Adams has been substituted as trustee. Under said deed, he has sold two pieces of property covered by said deed, and has advertised other portions of it for sale. Adams admits that he used the proceeds of said sale as if the money belonged to him absolutely. His family have enjoyed the money advanced by them to him, and said property conveyed is subject to the payment of their demand, whether this deed be annulled or not. They have reason to believe, and do believe, that Adams will sell all of said property, and convert its proceeds to his own use, unless he be enjoined. They prayed for an answer to said allegations, that said deed be declared void as to them, and that Adams be made to pay them said account. The Chancellor granted a temporary injunction, and ordered Adams to shew cause why it should not be continued.

He made the following answer, in response to said order: He admitted that he was in their debt, on the 22d of September, 1869, and said that indebtedness was in this way: They held his note for $4,025 00, made on the 3d of September, 1869, secured by a deposit of one hundred and seventy-nine shares of stock, in the Macon and Brunswick Railroad Company. Soon after, but perhaps after the 22d of September, 1869, they sold one hundred of said shares for $3,300 00, and applied that to the part payment of said note, and they

hold the other shares yet. Besides this, as appears by his bank book, he owed them on the 22d of September, 1869, $7,930 20. On the 23d of September, 1869, he deposited with them $7,197 55, and on that day issued checks amounting to only $107 17; so that, exclusive of said note, and leaving out any reckoning of usury, he owed them when the deed was made $839 82. Said deposit was proceeds of cotton owned and held by him, on the 22d of September, 1870. Estimating said stock at $30 00 per share, said shares would overpay said note by $1,341 00, which added to said deposit would overpay all of said indebtedness.

When said deed was made, he kept out realty and railroad stock in Georgia worth, as he believes, $6,400 00, besides an interest in two lots, supposed to contain copper, for which he would take $5,000 00; it was worth but little if it has no copper. Since making said deed he has sold considerable of the realty, not covered by the deed, and this he was compelled to do, to prevent possible loss on cotton bought since the deed was made. This deed was not made to defraud any creditor; loss was not then anticipated, and his property outside of said deed, was on the 22d of September, 1867, sufficient to pay all his debts, except some advances which had been made by his father-in-law, which he regarded when they were made, as debts which would never harrass or oppress him, and so he has been assured by his father-in-law; the larger part of these were used in paying for said residence, and he regarded it as a gift to his wife, rather than a debt against him. He made the deed simply to protect his family against possible losses by him in business. Before he did it, he was advised by Hazlehurst to make such provision, and he told him he would. Since making it he sold one of the lots covered by it, at $900 00, and used the money, (so far as used at all), in family expenses; he may have used part of complainants' advances in the same way, but the bulk of them was used in purchasing cotton.

During the several years of his business with complain-

ants, they charged him from two to two and a half *per cent.* per month as interest, and this usurious interest is necessary to make up said claim against him. What part is usury he does not know accurately, but the commissions and interest charged by them against him, from the 19th of August, 1867, to the 9th of October, 1869, is $1,847 02. What interest was charged from January, 1866, to the 19th of August, 1867, he does not know; the interest charged from the 9th of October, 1869, to the 17th of August, 1870, is $1,615 26. He claims this usury as a credit.

Complainants then submitted affidavits of the following purport. Hazelhurst affirmed that he had had a conversation with Adams, touching a settlement on his family, before the date of said deed, to-wit: in the spring of 1868, when Adams had been successful and could make a settlement and have enough to pay his debts besides; that this was merely a casual conversation. Adams did not say he would, and did not tell him that he had done so, nor ever alluded to the subject, and the setlement was discovered by accident; and that complainant did not charge two and a half *per cent.* interest per month, as stated in the answer, so far as he could discover from the firm books. Cubbedge affirmed that Adams had frequently said to him that he owed his father-in-law, Flanders, more than he owed complainants, and regarded it as a debt; said they had not charged him usury as stated in his answer; has admitted that his family got, in the aggregate, as much as a year's support out of their advances; that, since said deed was made, Adams has more than once treated the property covered by it as his own, and used a part of the proceeds of that which was sold. He and Hazelhurst both affirmed that Adams had, by assurances, etc., led them to believe all his property was bound for their advances, and this last was affirmed also by their bookkeeper. Further, he said, no collateral was ever required for any balance or draft, but they dealt with him upon the faith of his having property sufficient to meet the same, and the relations of

the parties in business were very confidential; he also says they never charged Adams usury, as claimed by him in his answer.

Other affidavits stated the indebtedness of Adams, on the 22d of September 1869, as follows: To Rice & Davis, Boston, $4,000 00; to Hardeman & Sparks, $1,852 24; to Harris, Clay & Company, $29 35; to S. Anderson, $78 62; to S. T. Coleman, $194 13; to J. L. Shea, $85 00; to F. Lake, $375 00; to J. H. Hertz & Company, $67 00; to A. P. Collins, $75 00; to Heath, Tax Collector, $181 00; to Singleton, Hunt & Company, $57 00; to Mix & Kirtland, $41 15; to J. W. Burke & Company, $54 66; to the City of Macon, $135 00.

In support of his answer, Adams affirmed that the conversation alluded to in his answer, when Hazelhurst advised him to make such settlement, occurred just before he did make it, on the sidewalk opposite Strong's store; that his indebtedness was several hundred dollars less, when said deed was made, than he had stated in said answer; that Hardeman & Sparks' debt was for cotton bought before the 22d of September, 1869, and then on hand; the draft drawn against it was deposited with complainants, and when the cotton was sold, its proceeds were applied to the payment of the draft; that the Rice & Davis debt was for cotton shipped to them; a draft was drawn in favor of complainants against it, the cotton was sold, paid the draft, and left a surplus of $390 00, which should be added to his assets; that he has paid said debts due to Heath, tax-collector, Burke & Company, and City of Macon, and part of some others of said debts mentioned in affidavits aforesaid; that, excepts Shea's and Hertz's, said demands were for family supplies and taxes and work on the residence lot; Shea's and Hertz's being for clothing, mostly for himself, and that he either thought some of said accounts were paid or overlooked them in estimating his indebtdness. Flanders affirmed that, as to the advances made by him to improve said residence, he supposed Adams and his family

always considered them as a gift to the family, and that he never intended embarrassing Adams in any way with respect to them.

After reading these pleadings and affidavits, complainant's counsel proposed to except to Adams' answer and have him answer over. The Chancellor would not allow it, saying it could not be done upon this motion; but that if it were evasive or insufficient, he would consider it in deciding upon the injunction. They then proposed to swear Adams, (who was present,) and examine him orally touching the matters in which they thought his answer insufficient and evasive, and as to the whole controversy. Adams' counsel objected and the Chancellor would not allow that done. It was admitted that counsel for Adams had been asked before the hearing if he would consent to have Adams so examined, and that he refused, and that he was also asked if he would advise Adams to refuse to give complainant's counsel an *ex parte* affidavit to be used against him, and said he would not. (Counsel said here in argument, that he so objected and refused only because said requests were illegal, and not because he feared Adams had withheld any part of the truth.)

After argument, further injunction was refused, and the temporary one set aside. Complainant's counsel say the Court erred in refusing to allow them to except to said answer, and to examine Adams orally, and in refusing the injunction prayed for.

NESBITS & JACKSON, for plaintiff's in error, cited as to the right to except: 1st Tr's Edn. on Inj., 127; 2 Dan. Ch. Pr., 872, 877; 13th Ga. R., 140; 26th, 152; 27th, 210; 9th, 95. As to the oral examination, Code, secs. 3697, 3757, *et seq.* Voluntary settlement void against creditors: Code, secs. 1942, 1768. Creditors may go into equity to set it aside: Code, secs. 1935, 1936, 1937, 2709, 3040, 3041, 3115, 3116, 3118, 3121, 3127. Remedy is incomplete without injunction: Code, secs. 3149, 2598, 3037, 3064; 6th Cranch.

R., 87; 12th Peters, 11; 2 Call., 183; 2 Munf., 368; 2 Brockenboro, 152 note; R. M. Charlton, 380, 358; 8th Ga. R., 444; 19th, 230, 404; 20th, 210; and equity will intervene before judgment: Code, secs. 3040, 3149, 3159, 4119; 36th Ga. R., 534; 33d, 672.

LAMAR & ANDERSON, for defendant.

WARREN, J.

In reviewing the allegations made in the complainant's bill, the answer of the defendant, and the affidavits filed by the respective parties in support of, and in opposition to, the granting the injunction prayed for, we find no error which will authorize this Court to control the sound discretion of the Judge below, in refusing to grant the injunction.

Let the judgment of the Court below be affirmed.

PATRICK PEYTON, plaintiff in error, *vs.* HENRY J. LAMAR *et al.*, defendants in error.

A mere general creditor who has not reduced his claim to a judgment, and who has no lien upon the property of his debtor, has no right to come into equity to enjoin a mortgage given by the debtor to another creditor, on the ground that the mortgage is upon property to which the debtor did not acquire title until after the date of the mortgage.

Mortgages. Injunctions. Before Judge COLE. Bibb county. Chambers. March, 1871.

Peyton's bill made this case: In May, 1870, he loaned Neville $300 00, and took his note therefor, and borrowed for Neville other $700 00, and stood his security therefor. Neville was then publishing and conducting "The Macon Daily Journal," with Harrison and Ricks as his partners. Neville was trying to buy them out, and Peyton let him have

said $300 00, and procured for him said $700 00 for that purpose, at the instance of one Doyle, who Peyton supposed was going to join Neville in that purchase. But Doyle had no such purpose, and Neville alone made the purchase, and paid said money to his partners. At the time, Peyton knew of no lien on the presses, etc., of said newspaper office, but he learns that said partners took from Neville a mortgage on the same, to secure the balance of the purchase-money; and on the 9th of February, 1870, Neville and his said partners had given Henry J. Lamar a mortgage on the same, to secure their note to him of that date, for $2,500 00, and due twelve months thereafter. When Lamar's mortgage was made, (as Neville says,) his firm did not own or have possession of the press and materials afterwards used in the publication of said newspaper, and which Lamar claims to be covered by his mortgage. Nor did they then have any right to the possession of the same, they then not having purchased said property. Therefore, Lamar's mortgage is not a valid lien on the same. Yet he has foreclosed it, had it levied upon the same, and the sheriff is about to sell it to satisfy said mortgage. The proceeds will not pay Lamar and said $300 00, and said $700 00, and Neville is otherwise insolvent. Wherefore, he prayed injunction against said sale.

To this bill was attached an affidavit by Neville, that his said saying was true. The Court ordered Lamar to shew cause why the iujunction should not issue. He answered that his said mortgage was duly recorded in April, 1870, and, therefore, Neville had notice of it. His debt was created under the following circumstances: Harrison owned or controlled the two presses connected with the office, and the stones belonging thereto, and Neville and Ricks proposed to take them and purchase all other material to fit up an office for a daily and weekly paper and job work. They applied to Lamar, stated their project, told him what they had on hand, and asked a loan of $2,500 00 to buy the material for said purpose, and offered to mortgage said presses and stones

and what should be purchased. Lamar assented. They had agreed upon the name of their paper, took the money and gave their firm note and mortgage as aforesaid, and with the $2,500 00 bought material as aforesaid. And those presses and stones and this material he now is trying to have sold. Harrison's brother owned the presses and stones, but Harrison had control of them, they being in Macon, subject to his order. The subsequent mortgage to Harrison and Ricks was expressly made subordinate to Lamar's. And Harrison and Ricks swore to the same. The Chancellor refused the injunction, and that is assigned as error.

LANIER & ANDERSON, for plaintiff in error.

LYON, DEGRAFFENRIED & IRVIN, for defendants.

MCCAY, J.

We do not care to go into the question of the validity of this mortgage. Our Code in declaring what things may be mortgaged does not declare that other things may *not* be: Code, section 1944. Nor are we sure that, under the facts of this case, this mortgage is not within, at least, the equity of the last clause of the section we have referred to. Besides, the recognition of this mortgage by the parties *after* the property had fully come into their possession, would make it valid, even if there be doubts about its original validity. There might, perhaps, questions arise between Lamar and subsequent purchasers of this property, or between him and the sellers of it, claiming a right of stoppage in *transitu*. The former class might claim that they were not bound to look on the record for mortgages dated before the title of the mortgagors accrued, and the latter would have a very high equity against the mortgagee. But the present complainant has no *interest at all* in this property. He is a simple creditor; he has not even a judgment lien. If Lamar were enjoined what good would it do him? The owner of the

property could next day sell it and pay Lamar, or give him another mortgage, or sell it and put the money in his pocket, and the whole machinery of an injunction and a bill in equity would end in smoke.

We have decided at this term, in the case of *Cubbedge & Hazlehurst vs. Adams*, that, as a general rule, a simple creditor, who has no lien on the property, cannot enjoin his debtor from selling it, nor come into equity to ask its interference to preserve it until he can get a judgment.

There are some peculiar cases where equity will interfere, but they stand upon their own facts.

The case of *Cohen vs. Meyers*, at this term, was one of these. In that case it was charged, that the debtor had *fraudulently procured* the property from the plaintiffs, with intent not to pay for it, and that the vendee or nominal possessor knew of this. And it will be found, that all the cases, where this rule has been broken into, have turned upon peculiar circumstances, and the complainant had, in fact, an equitable interest in the very property he was pursuing.

The general rule is fully discussed in 2d Johnson Chancery, 144. The case in 36 Georgia, 534, was of a married woman who contracted for the goods in Tennessee, as a free trader, under their law. She could not be sued here at law, and the goods had been purchased from the complainant. The facts showed so gross a case as justified the inference that the *purchase* was fraudulent.

We do not intend to lay down any positive limit to the right of injunction in such cases, but, to give the Court jurisdiction, there must be some other equity than the mere existence of a claim and a probability that the defendant will not apply his effects towards the settlement of it.

Judgment affirmed.

STEPHEN B. WALKER, plaintiff in error, *vs.* ELIHU H. WALKER, defendent in error.

A testator made his will and bequeathed one-sixth part of his estate to the children of his son Elihu, and directed that his son should have the right to become the guardian of his children under age, upon his giving bond and good security for the faithful payment of the principal when his children should become of age, and pay no interest on their respective estates—and Elihu became the guardian of his son. Stephen V. gave the bond and received his share of the testator's estate under the will, in the year 1854 or 1855, and at first mingled the money so received for his son with his own money, and loaned it out at interest with his own, making no distinction between his own and that money; loaned large amounts of money to Cochran & Dumas, who were then reputed to be solvent, and never separated his son's money from his own until 1862, when renewing Cochran & Dumas' notes, he took the notes payable to himself as guardian of his son, and a mortgage on property to secure the payment thereof, which mortgage security became valueless, there being a prior judgment lien on the mortgaged property, and Cochran & Dumas became insolvent. On the trial of an action brought by the son, Stephen V., against his father as guardian, to recover the amount due him under the will of his grandfather, the Court charged the jury, that "if the defendant, as guardian for the plaintiff, loaned his money to persons good and solvent at the time of the loan, and used ordinary diligence to secure the debt, and such diligence as he used in his own business, and the debt was lost, he should not be held responsible for the loss, as he had a discretion to loan the money or not, as he might see proper:"

Held, That the charge of the Court as applicable to guardians and trustees, under the general law of this State, who are required to pay interest on the funds in their hands, was in substance a legal charge; yet, under the facts presented by the record in this case, the charge of the Court was error, inasmuch as it was clearly the intention of the testator, by his will, to secure the payment of *the principal sum* bequeathed to his grand-children on their becoming of age, in any event, and the guardian having received the money under the terms and provisions of the will, he is bound to conform thereto. He was not bound to pay any interest, and if he made any interest or profit from the use of the money, it was for his own benefit—the profits arising therefrom were exclusively his own, and the risk was his own, if he lost the principal in loaning it to make interest for himself.

Guardians. Interest. Before Judge GREEN. Munroe Superior Court. August Term, 1870.

Thomas Walker died testate. His will gave certain money to his grand-children, and directed that his "own children have the right to become guardians for their own children that are not of age, and pay no interest on their respective estates, by giving good bond and security for the faithful payment of the principal, as their heirs become of age, and in case my children fail to comply with this requirement, guardians must be appointed as the law provides in other cases in this State." Elihu H. Walker was one of Thomas Walker's "own children," had minor sons, gave bond and became their testamentary guardian according to said will.

Stephen V. Walker, son of Elihu H. Walker, in July, 1869, sued him as his guardian for $1,341 00, due him by his father, as such guardian. The defendant pleaded that the plaintiff was *non compos mentis*, had a trustee, and could not recover in his own right; that he loaned this money to solvent parties, who became insolvent, and had fully settled the matter with the plaintiff's trustee, by a judgment of the Court of Ordinary. On the trial, plaintiff's counsel read in evidence said will, the order appointing Elihu H. as his guardian, and a letter from Elihu H. to plaintiff, dated February 12th, 1869, in which defendant stated that plaintiff would be of age on the 17th of February, 1869; that the amount received by him, as guardian for plaintiff, was $1,341 00, for which he held Dumas' note and mortgage, but that they were worthless. Averring that that would defeat plaintiff's claim on him, in law, he added that he had applied to the Judge of the Superior Court and obtained an order to pay over to plaintiff's agent or trustee whatever the Court at March Term, 1869, should decree to be due him.

The defendant then testified, as follows: Plaintiff was born diseased, and is of weak mind. Believing him to be incapable of managing his own business upon arriving at age, when he was approaching majority, he petitioned the Judge of this Court to appoint a trustee for him to make a

settlement with witness as guardian of plaintiff, and take charge of what property or money might be coming to him, so as to prevent him from wasting it. Witness received the money of his children from his father's estate, in 1854 or 1855, and was two or three years getting all the money in, and at first mingled it with his own money, and loaned it out at interest with his own, making no distinction between his own and that money. He loaned large amounts to Allen Cochran and James H. Dumas, and his son, W. J. Dumas, who were then reputed to be solvent—Cochran owning over one hundred slaves and Dumas over thirty; and never separated the money of his ward from his own until 1862, when, renewing the notes, he took the notes payable to himself, as guardian, from Dumas and with Cochran as security. The notes were renewed by them twice. Cochran died, and his estate being insolvent, he then took notes from Dumas payable to himself as guardian of his son, Stephen V. Walker, and A. H. C. Walker; on the last renewal of said notes in 1865, he took a mortgage from said Dumas, on lots in the town of Forsyth, to secure the payment of said notes. The property mortgaged to witness to secure said debts, he found afterwards, subject to a judgment in favor of John Neal, of older date than witness' mortgage. Witness employed counsel to have the judgment of Neal set aside, to get it out of the way of his mortgage, but failed. The property mortgaged has all, since the death of Dumas, been set apart to his widow for twelve months' support and dower, and the debt on Dumas is thus lost, as his estate is insolvent. Witness also lost largely in debts on Cochran and Dumas—as much as $10,000 00. His mortgage on Dumas' property has not been foreclosed, and nothing was done to secure it but a motion made to set aside Neal's judgment, which failed.

Witness thinks that on the day the Ordinary made the settlement, Stephen V. Walker was in town, but was not present at the settlement.

Witness testified he could not distinguish the money of

his children from his own, as it was all together and loaned together, without separating one from the other, until he separated it in taking the notes from Dumas and Cochran, in 1862; that he gave his son, A. H. C. Walker, the amount due him, and more than the amount due him, upon his arriving at age, though he did not consider that he owed him anything.

Defendant's counsel read in evidence a record showing the following facts: In January, 1869, defendant presented to the Judge of the Superior Court a petition, in which he explained that he was such guardian of plaintiff, then about to be of full age; that plaintiff "is wholly incapable, from his habits of life and want of mental capacity, to take charge of his property," and prayed that, "for the protection of his son's property, his (defendant's) brother, William Walker, be appointed his trustee, with power to make a final settlement in the Court of Ordinary, with petitioner, as to whatever amount may be found due him." To this was attached a copy of said will, a consent by William to become such trustee, an affidavit by Elihu H., William and G. W. Walker, and a physician, that the facts in the petition were true, and an order passed by Judge Green, on the 29th of January, 1869, at Chambers, granting the petition and giving the power as prayed for, and a bond by William Walker, as trustee, with defendant as his security, for the faithful performance of said trust by said William.

They also read another record, showing the following:

Defendant petitioned the Ordinary for citation, requiring William Walker, as trustee, to appear and settle with said defendant as to said trust; on 1st of March, 1869, the Ordinary ordered William Walker to appear at his next Court to make said settlement, and plaintiff to appear and shew cause why such settlement should not be made, upon which William Walker and the attorney for plaintiff acknowledged service; at July Term, 1869, the Ordinary adjudged that the amount due was $1,341 91, that this was loaned to Du-

mas and secured by mortgage, and ordered the note and mortgage of Dumas turned over by defendant to William Walker, as trustee, and that defendant "be, and is hereby discharged from all further liability as guardian."

Defendant also read in evidence a mortgage made the 9th of September, 1865, by one Dumas, to defendant as guardian of plaintiff and another son, upon certain lands therein described, and to secure two notes made on that day by Dumas, payable to defendant as guardian for the two sons, one for $1,563 37, due the 1st of January, 1857, and the other for $1,150 00, due the 1st of January, 1869. In rebuttal, plaintiff's said attorney testified that he did not recognize the authority of William Walker, as trustee, to make such settlement, that the citation was for a settlement of accounts of defendant as such guardian with said William as such trustee; that he acknowledged service as aforesaid, but had no notice that a settlement was to be made at July Term until told, while the Court was sitting, that the settlement was then about to be made, and that he had no recollection of seeing plaintiff in town that day.

The parties having closed, the Judge charged the jury that, if they believed from the evidence that the citation for a settlement in the Court of Ordinary was for a settlement of the accounts of the guardian with William Walker, trustee for S. V. Walker, and not with S. V. Walker himself, in his own right, then the judgment of the Ordinary, in the final settlement was not binding on the plaintiff, and he was not concluded by it; and the appointment of William Walker, as trustee for S. V. Walker, was irregular and illegal and null and void; and William Walker had no authority from that appointment to act as trustee for S. V. Walker, and represent him in a settlement with his guardian; and in that case they should find for the plaintiff; but if they believed from the evidence that S. V. Walker was cited, in his own right, after arriving at age, to appear before the Ordinary for a settlement with his guardian, and failed, or refused to appear,

and the Ordinary proceeded to make a settlement between him and his guardian, and made an adjudication between them which was not appealed from, that judgment, in such a case, is binding and conclusive upon the plaintiff, unless there be fraud or mistake in the judgment; but the judgment of the Ordinary must follow the pleadings, and must be between the parties cited to be binding; if it goes beyond the pleadings and makes an adjudication between parties not cited to appear for a settlement, in such case the judgment is a nullity and not binding.

The Court charged further, that if the defendant, as guardian for the plaintiff, loaned his money to persons good and solvent at the time of the loan, and used ordinary diligence to secure the debt, and such diligence as he used in his own business, and the debt was lost, he should not be held responsible for the loss, as he had a discretion to loan the money, or not, as he might see proper; but if they believed from the evidence that the defendant, when he at first received the money of the plaintiff, mingled it with his own, and continued so to manage it for a considerable time, and afterwards finding that he was about to lose money, then separated it and put it upon his ward, taking notes payable to himself as guardian, and the money was lost in such debts, the defendant is responsible to the plaintiff, and the jury should find for him. The jury returned a verdict in favor of the defendant. Whereupon plaintiff's attorneys moved the Court for a new trial upon the following grounds, viz: The verdict is contrary to the law and charge of the Court, to the principles of equity and the evidence, and because the latter paragraph of the charge is erroneous. The new trial was refused, and error is assigned on said grounds.

CABANISS & PEEPLES, for plaintiff in error, said William Walker's appointment was void: Code, secs. 1843 to 1855. As to liability of guardians: Bingham on Infancy, 169; Note, 171; 13 Pick, R., 211, 212; 1st Atk. R., 489; Tyler on In. 262; 8th Gill and J. 218.

A. D. HAMMOND by A. M. SPEER, for defendant.

WARNER, J.

The charge of the Court to the jury as applicable to guardians and trustees, under the general law of this State, who are required to pay interest on the funds in their hands, was in substance a legal charge; but as applicable to the statement of facts contained in the record of this case, it was error, inasmuch as it was clearly the intention of the testator by his will to secure the payment of the principal sum bequeathed to his grand-children on their becoming of age, in any event.

Let the judgment of the Court below be reversed.

JAMES R. WALKER *et al.*, plaintiffs in error, *vs.* DAVID K. WALKER *et al.*, defendants in error.

Where a bill was filed to enforce the delivery of cotton under a contract entered into between the parties thereto, and for damages for non-performance thereof, and by order of the Judge a bond was required in the sum of $50,000 00 from the defendant, conditioned for the performance, or to answer the decree of the Court, and upon the hearing a consent verdict was taken and judgment entered up against the principal and his securities upon said bond, and the securities moved to vacate and set aside the judgment as to them, which was granted by the Court:

Held, That the judgment of the Court below was correct. The right to enter up judgment against securities at the same time with their principal, exists only by statute, and can only be done in such cases where the statute has changed the common law. In cases of bonds *quia timet*, while the ultimate liability of such securities may be fixed as to the amount by the judgment against their principal, and the spirit of our law is to disencumber legal rights from unnecessary formalities or multiplicity of suits, still in cases like the present it requires a legislative act to authorize the Courts to apply the analogies, arising under the grants of power conferred in cases of securities under other statutes, against securities on appeal, attachment, garnishment, *certiorari*, bills of error and claim.

Securities. Equity. Before Judge GIBSON. Upson Superior Court. May Adjourned Term, 1870.

All the facts necessary to an understanding of the points in this cause, passed upon by this Court, are set forth in the opinion.

CABANISS & PEEPLES, SPEER & BECK, for plaintiffs in error. It was right to enter judgment against the sureties on this *quia timet* bond, at the time judgment was entered against their principal: 28th Ga. R., 566 ; 1st, 72. No suit necessary, the Court will mould a decree: 39th Ga. R., 82; R. Code, secs. 3027, 3030. By analogy: 40th Ga. R., 26; R. Code, sec. 3370.

DOYAL & NUNNALLY, S. HALL, for defendants. There could not have been any specific performance: R. Code, sec. 3132. *Ergo*, no analogy with suit for specific property: R. Code, secs. 3370, 3371; nor with appeal bonds: *Ibid*, sec. 3513; nor with replevy bonds in attachments: *Ibid*, sec. 3243; nor with bonds to dissolve garnishment: *Ibid*, sec. 3488; nor with *certiorari* bonds: *Ibid*, sec. 3982; nor with *supersedeas* bonds: *Ibid*, secs. 4203, 4222; nor with bonds to appeal from Ordinary: *Ibid*, sec. 3550. In no other case is this right given by statute: 1st Kelly, (Ga. R.,) 73, 74; 28th, 566; 6th, 418. Courts of Equity cannot add to obligations and liabilities: 17th Ga. R., 77.

LOCHRANE, C. J.

It appears from the record in this case, that one N. F. Walker, being indebted to the plaintiffs in error, in the sum of $46,000, on the 27th of September, 1865, entered into a written agreement with them, by which he promised, in settlement of such indebtedness, "to pay and to deliver to them, by the 25th of December next thereafter, two hundred and fifty bales of cotton, for which he was to receive twenty-six

cents per pound." In pursuance of this agreement, he delivered a portion of the cotton, and then refused further delivery, on account of alleged garnishments having been served upon him, and other contingent liabilities.

A bill in equity was then filed, setting up this agreement, and praying first a specific performance by a proper delivery of the cotton, also an injunction restraining him from selling said cotton, or any other portion of his property, and requiring him to hold the same to answer any decree that might be obtained in the premises; also, that he might be arrested and held in custody until he entered into bond, with good security, not to remove or dispose of the cotton, and to leave the same to answer any decree in the premises.

And also an order *quia timet*, requiring him to enter into bond, with ample security, for the forthcoming of the cotton and other property, to pay whatever sum of money might be recovered from him, in the premises, was prayed for.

On the 21st of December, 1865, the presiding Judge sanctioned this bill, authorizing injunction and *quia timet* to issue, under penalties named, and the arrest of the defendant, until he entered into bond, with security, conditioned for his performance of the contract, and to answer any decree that might be had in the premises.

From some misapprehension upon the part of the Clerk, in relation to the various processes prayed and orders thereon, it appears that the Judge, at the May Term, 1866, passed a more specific order requiring the defendant to enter into bond, in the sum of $50,000 00, conditioned "to well and truly perform his contract in the delivery of the cotton and to answer any decree that might be had in the premises."

Complying with this order of the Court, the defendants in error, now before the Court, united with Nathaniel F. Walker in the bond given in terms of said order. In response to this bill the defendant set up various defenses, and the complainants amended their original bill by abandoning the matter of specific performance and asking damages, reserving

election, however, on the trial. At the November Term, 1867, a consent verdict was rendered, leaving amounts blank, which, upon a hearing of the parties by the Judge, were to be ascertained by him, and inserted, which was subsequently done at Chambers, and by order entered upon the minutes of the Court.

This verdict, and decree thereon, was entered up against the defendant and his securities, upon the bond. And the case now comes up before the Court upon the motion of these securities to vacate and set aside the decree rendered against them, and the judgment of the presiding Judge affirming their motion, and vacating and setting the same aside, which is assigned as error.

In the decision of this question, we will adhere strictly to the matters at issue, and do not deem it necessary or proper to go into the variety of questions that have been argued before the Court.

Can judgment be entered up against the securities on the bond given in this case, at the same time with the rendition of the decree against the principal? This is an important question, and we have considered it carefully upon principle and authority.

The Code, section 3243, in cases of attachment, provides for replevy bond, and that "it shall be lawful for the plaintiff to take judgment against the defendant and his securities upon said bond." Section 3513 declares: "In all cases of appeal, where security has been given, the plaintiff, or his attorney, may enter up judgment against the principal and surety jointly and severally." Section 3488 provides, in cases of bonds given to dissolve garnishment, "the plaintiffs may enter up judgment upon such bond against the principal and securities, as judgment may be entered against securities upon appeal." Section 3982 makes provision in cases of bond given on issuing *certiorari*, that the security on said bond shall be liable as securities on appeal. And such special provision is made in relation to matters arising on writ

of error where bond is given, and in matters appealed from the Ordinary: Section 3563.

But in this case the law is silent, and we are, therefore, left to the principles of the common law, except by reason and analogy we are enabled to bring the case within the application of the sections quoted. Upon the proposition of law found in 1st Kelly, 72, we may conclude that the amount found against the principal is the amount fixed against the sureties, and why multiply suits to settle what may be regarded beyond controversy. The spirit of the law is to disencumber legal rights from unnecessary formalities, and to apply the principle would be easy and embrace all cases standing under the provisions of securities. But no matter how simple the process, or how apparently reasonable, to accomplish it, it requires a legislative, not a judicial act. We have no power, as a Court of errors, to make law; the limitation of construction is to laws existing. And inasmuch as at common law no such provision exists and our Code does not provide legislation to embrace it, every reason fails to invoke its exexercise upon our part.

We have examined sections 3370 and 3371 of the Code, but find no ground of analogy between cases of bail in trover and the case at bar. The foundation of this bill rests on no right to recover any specified cotton. The terms of the agreement negative the presumptions of analogy, and the processes and pleadings do not invoke it. To such construction of the terms of this bond the securities might well reply, "*non hæc in vincula venimus*:" we entered into no such obligation.

The case of *McNeil, administrator, vs. Harker*, 40 Georgia, Reports 26, has been considered, in its application to the case at bar, and we do not see, in the jndgment of this Court in that case, a reason to extend or enlarge the rule of construction there held by the Court. In that case the landlord distrained, and the tenant replevied; the bond the securities gave was conditioned that "they or either of them shall well

and truly pay the eventual condemnation money," etc. The law provides the return by the levying officer to the proper Court, "*to be tried by a jury, as provided for in the trial of claims*," and section 3685, Revised Code, directs the oath of the jury on such trial, and by the law judgment may be entered up against the *claimant and his security, etc.* The distinction appears at a glance, and the mode of trial, as well as special provision of law, applies to that case. But in the case of securities on *quia timet* bond there is no special provision. Their obligation is in the nature of a contract of indemnity, and in no statutory provision do we find any right to enter up judgment against them at the same time with their principal, and, inasmuch as it could not be done at common law and there is no change of the common law by statute that authorizes it, we affirm the judgment of the Court below.

Judgment affirmed.

JOHN A. BRUCE, plaintiff in error, *vs.* J. A. TURNER, executor, defendant in error.

Where there has been a verdict of the jury upon the merits of the issue between the parties, and the Judge refuses a new trial, this Court will not disturb the verdict if there be any evidence to sustain it.

Verdict. New Trial. Before Judge GREEN. Newton Superior Court. September Term, 1870.

This was complaint against Bruce upon his due bill for $120 00, given on the 19th of May, 1868, as "balance of settlement." Bruce pleaded that this due bill was the ending of a long, detailed course of borrowing money by him from plaintiff's testator, that its sole consideration was usury, and pleaded also an excess of usury paid, as a set-off. After hearing all the evidence, and the charge, the jury found for

plaintiff for $137 50, being principal and interest. Defendant moved for a new trial, upon the grounds that said verdict was larger than the principal sum sued for, and because the verdict was decidedly against the weight of the evidence, etc. The new trial was refused, and that is assigned as error.

JOHN J. FLOYD, A. B. SIMS, for plaintiff in error.

CLARK & PACE, for defendant.

McCAY, J.

This is a case turning wholly upon the facts. It is an effort to set aside the verdict of a jury, because contrary to evidence, and to overrule the judgment of the Judge in refusing a new trial.

As we have ruled over and over again, this cannot be done, except in a strong case, one which makes a case of illegality, one in which the jury has acted, from mistake or prejudice, and one in which the Judge has abused his discretion. We do not think this is such a case. Indeed we are inclined to think we would have found just as the jury did. The evidence is conflicting, to say the least of it. Clark testifies that the settlement was made, rejecting all usury, and the circumstances go strongly to show that this note was given in settlement, after all usury had been purged from the dealings between the parties in the transaction.

Judgment affirmed.

THE NEWTON MANUFACTURING COMPANY, plaintiff in error, *vs.* H. & T. M. WHITE, defendants in error.

1. Where an action brought against a corporation by its corporate name, was proceeding in Court, and such defendant pleaded that it was dormant, and not using its franchises conferred by its charter, and the evidence under such plea was rejected by the Court, and the record shows that the corporation was created under the Act of 1847, adopting the name of the "Newton Manufacturing Company," and that by such name it had commenced business, and that one party had purchased out and took sole control and ownership of the stock and property, and that under the same name, the business was continued after such purchase, the same agents remaining in the ordinary and accustomed discharge of duty, the books appertaining to the business, and brands or stamps upon the manufactured goods being carried on unchanged, and that in the case before the Court, certain cotton was procured for the Newton Manufacturing Company, contracted for by an agent in its name and received by it:

Held, That the fact of one becoming the owner of all the shares of stock and property of said company, did not, under the facts, render the corporation dormant, or forfeit the franchise of the company; and as long as the company, by its officers and agents or owner, carried on the business in the corporate name, it was by that name liable to suit for all contracts made in its name, and the right of suit exists until the liability so incurred was discharged, and it was not error in the Court to disallow testimony of dormancy, which would have been neither pertinent nor material.

2. Where, upon contract entered into for cotton, the party had his election to require the return of the cotton at places specified, or payment in money therefor:

Held, That a demand for settlement, and refusal to pay for the cotton, dispensed with any formal notice of election, and constituted sufficient demand and notice before the institution of suit to predicate the action.

3. When, in the progress of the case, evidence was rejected by the Court, to the effect that at the time the contract sued on was alleged to have been entered into by the defendant, a party was the owner in fact of the property of such Newton Manufacturing Company, evidence having been offered to show such dormancy of the corporation:

Held, Under the facts where the business was carried on in the charter-name, with the knowledge of the said stock-owner, and under such name the contract sued upon, by the agent of such company was entered into, that the evidence was not material to the issue in the case, as it made no difference as to the fact of who owned the property. If the

business was carried on in the corporate name without notice to the public of such sale or transfers, the suit was properly brought against the corporation.

4. Where in a matter of fact evidence has been submitted to the jury, and the charge of the Court has fairly presented the questions at issue and the law thereon to them, and they have found a verdict sustained by such testimony:

Held, That this Court will not grant a new trial or reverse the Court below refusing to grant a new trial upon this ground.

Corporations. Pleading. Evidence. Agency, etc. Before Judge GRENN. Newton Superior Court. September Term, 1870.

H. and T. M. White brought against the Newton Manufacturing Company, a corporation, an action for certain cotton alleged to have been sold by them to defendant on the 1st of July, 1865, at fifty cents per pound, in one count, and in another for certain cotton on that day loaned by them to defendant upon its promise to pay for it at said price or return it in kind, on demand; and they averred a demand, and a refusal by defendant to pay or return the cotton in kind. Service was by leaving it at defendants' "most notorious place of business." In March, 1867, defendant pleaded the general issue. In March, 1868, they had a verdict for $3,600 00, with interest from the first of April, 1866. The defendant appealed and gave bond in the corporate name, with W. R. Phillips, and another, as securities. Defendant pleaded, in November, 1868, that, from 1861, up, it did not exercise any of its franchises, had no officers or agents appointed, according to its by-laws, and was incapable of contracting or performing any of its corporate functions, but on the contrary, was dormant, and in a state of suspension. This plea was then and there stricken, because pleaded too late. Plaintiffs had another verdict for $3,117 68. A new trial was granted, plaintiffs excepted, and their bill of exceptions was dismissed here, at June Term, 1869. See 38th Georgia Reports, 587.

In September, 1870, the defendant further pleaded, that the cotton was bought by it to aid "the rebellion," and repeated the plea of disability substantially, as aforesaid, with the addition that, at the time of the alleged contract, defendant and its members had transferred its franchises and property to one person, who was not a member of the corporation, before the making of said alleged contract.

One Thompson testified that he borrowed the cotton from one of the plaintiffs, at the instance of W. R. Phillips and W. F. Davis, upon the understanding that Phillips, or the Newton Manufacturing Company would pay for it or return it in kind, on demand. Phillips was the owner and chief controller of the factory; Davis was managing the affairs of the Company, and had been for several years. Davis told witness the cotton was received.

Upon cross-examination, he said they did business under the name of the Newton Manufacturing Company. None of the original corporators had any concern in said Company; so far as he knew, W. R. Phillips was sole owner and controller. He remembered the terms of this contract, because he made one for himself with Phillips on same terms, and Phillips gave him a receipt for it, stating that "The Newton Manufacturing Company" had borrowed, etc., and Davis or Phillips signed the receipt "as agent."

White testified that he let Thompson arrange for the Newton Manufacturing Company to take the cotton; did not know Phillips was sole owner; and testified to a demand for settlement and refusal before suit begun. The plaintiffs proved the price of cotton, and closed. White's and Phillip's sayings and acts were objected to, and defendant moved to rule them out, but the motion was overruled.

Defendant read, in evidence, the Act of Incorporation of said Company, as a joint stock company, in 1847, to show who were the stockholders, and tendered deeds, etc., to show that all of them had sold out to Phillips before this trade was made. The Court ruled them out, saying that no evi-

dence tending to show the dormancy or suspension of the Company was admissible, because the plea of dormancy and suspension was a plea in abatement, and dilatory, and was filed too late, being after pleas to the merits. Defendant read, in evidence, the declaration in this cause, for what purpose does not appear. Other evidence of dormancy and suspension was offered and rejected.

Phillips then testified that up to August 20th, 1863, he signed, as agent for the Company, but having then bought all the stock and franchise, he ever afterwards did business as an individual, and signed Newton Factory, instead of the corporate note. And he said White knew he was sole owner, and went with him to get the hands detailed for the Confederate Government, and that he ran the factory for that government, and took pay in its bonds. He said he was individually responsible for this cotton, and would pay upon settlement of accounts with White. He denied signing Thompson's receipt for the Company, but said he signed for Newton Factory, though he said he had seen his agents using the corporate name and did not object, but recognized it by paying bills, etc.; he did not use the corporate name, but used "Newton Factory," in branding goods, etc.; he notified no one of the change of name, except the Secretary of the Governor. He denied the demand.

White testified that Phillips acted without appointment, as agent, and he acted for Phillips. The Court would not allow him to state when the corporation last had a meeting of its directors, etc.

He testified that when he spoke to Thompson he spoke as agent of the Company, but said he was then acting for Gardner who had control before Phillips did; but he said he signed usually as agent of the Company, and all his signatures of that kind were recognized.

In rebuttal, one Pennington testified, that he was employed by the Company before and after Phillips came there, up to March 1865, and he gave receipts whenever one was given

for anything bought in the corporate name by Phillips' order. Phillips told him to sign, "The Newton Manufacturing Company," not "W. R. Phillips;" "that he did not wish it known that he was the Newton Manufacturing Company. There was a mass of other evidence as to the delivery of the cotton not here important. In the opening argument plaintiff's counsel commented on "the fallacy" of the plea of dormancy to the jury. The Court would not allow defendant's counsel to reply to this to the jury, but said it was a question for the Court.

The Court first charged the jury upon his own line, and then took up the requests of plaintiff's and defendant's counsel, and disposed of them as appears below.

The Court having been requested to reduce his charge to writing, charged as follows:

1st. "This is an action of assumpsit, brought by H. and T. M. White against the Newton Manufacturing Company, upon an account for nine thousand and five hundred pounds of ginned cotton, alleged by plaintiff to have been loaned and delivered on or before the first day of July, 1865, to the Newton Manufacturing Company, to be returned in kind or paid for, as plaintiffs might elect, when demanded by them. Plaintiffs also allege that they demanded and requested settlement of the account for the cotton sued for before this action.

"The Court charges you, that if you believe from the evidence submitted to you that plaintiffs loaned to the defendants cotton as charged and alleged in the declaration, and that a demand or request was made by plaintiffs before the commencement of this action for payment, you will find a verdict for plaintiffs for whatever amount you may believe has been proven.

2d. "The defendants deny that they ever borrowed any cotton from plaintiff; and alleged that the cotton now sued for was received by Wm. R. Phillips, in exchange and payment of cotton due from one of the plaintiffs, Hugh White, upon

an individual transaction for cotton to said Phillips, and was not on defendant's account. If, from the evidence before you, you come to this conclusion, you will find a verdict for defendants and cost of suit, unless you find that defendants adopted the contract, and received the benefit. (To this charge, defendants excepts and assigns the same as error.) The Court further charges you that if you believe that Wm. R. Phillips borrowed the cotton, either by himself or through an agent on his own individual account, then you must find for the defendant. But if you believe from the evidence that Wm. R. Phillips was the general agent and controller of the Newton Manufacturing Company, and borrowed this cotton—subject matter of suit—either by himself or by an agent authorized by him, for the use of Newton Manufacturing Company, and that the credit was given to defendant, then your verdict will be for the plaintiffs.

3d. "And the Court charges you that if you believe from the proof that the cotton sued for, although the joint property of plaintiff's, was delivered to the Newton Manufacturing Company in exchange for cotton due from one of the plaintiffs, to-wit: Hugh White to Wm. R. Phillips, then it will be your duty to find for the defendant. The Court charges you that if the cotton was loaned to defendant to be used in aid of the rebellion, with the knowledge of the plaintiffs, the contract is void, and you must find for defendants. If, however, you believe from the evidence that the cotton was not delivered until after the surrender of the Confederate armies, although contracted to be loaned before that time, you must find for plaintiffs.

"The question whether Newton Manufacturing Company be dormant or not, is not before you, and the Court charges you that you have nothing to do with it. The only question for you to determine, is whether the Newton Manufacturing Company is liable upon the contract sued upon. This you must ascertain from all the evidence submitted to you, and make your verdict accordingly. (To this latter part of the

charge defendant excepts and assigns the same as error.) You must reconcile the testimony of the witnesses if you can, without imputing perjury to any.

"Where the testimony of plaintiffs and defendants is equally balanced, you must find for defendant. But, if it slightly preponderates in favor of plaintiffs, then your verdict should be in favor of the weight of testimony. In estimating testimony you may look to their interest, manner and means of knowledge of the fact or transactions about which they testify. If you, from the evidence, conclude to find for plaintiffs, you must ascertain first the amount of cotton, and then ascertain the price of cotton at the time of the demand by plaintiffs, (if there was one,) and the whole value of the cotton will be your verdict, with interest on the amount from that date. And on the other side, if you conclude to find for defendant, you will bring in your verdict: 'We, the jury, find for defendant with cost of suit.'"

The Court then charged the jury as requested by plaintiff's counsel, as follows:

1st. "That if those in control of the factory carried on business in the name of Newton Manufacturing Company, by signing receipts in its name by themselves as agents; and kept books in its name, signed papers incurring obligations in its name, and especially if William R. Phillips, if he had general control, directed any of its agents to continue that name in signing receipts, etc., then W. R. Phillips, or those thus acting, are estopped from denying either the existence of said corporation, or that such agents were not regularly appointed; for they will not be allowed to proclaim to the world that such a corporation existed, and such persons were its agents and then deny it.

2d. "If the jury believe that there is such a corporation as the Newton Manufacturing Company, and that it ever did business, and William R. Phillips took control of its business, and used its name and received for its use cotton belonging to the Whites, under a contract to account for it,

then both the corporation and Phillips, would be liable, as the Whites might elect. Phillips would be liable for the fraud in using said name, if not authorized to do so. The corporation would be liable by suffering its name to be thus used, to the prejudice of innocent parties. But in this suit the corporation alone, could, under this state of facts, be made liable, for it is the only defendant.

3d. "Innocent outside parties are not required to scrutinize closely the legality of the appointment of agents, who are held out to the world as such by those in control of the business about which said agents are employed."

4th. "That if the jury believe from the evidence that the Perry cotton was loaned to defendant through Thompson, and on the terms by him stated, and that a demand and refusal have been proven by plaintiffs before suit, then the plaintiffs are entitled to recover the value of the Perry cotton as proved."

Defendant's counsel requested the Judge, in writing, to charge the jury, 1st, "That an agent is not able or authorized to appoint an agent, unless he is authorized so to do by his principal. In application of this principle, if the witness Thompson was authorized by either or both, W. F. Davis or William R. Phillips, (who were themselves only agents) to borrow the Perry cotton, that is, the cotton sued for in this case, then he had no authority to borrow the cotton, and the defendant would not be bound by the terms of the contract made by Thompson. In such case, if the defendant, Newton Manufacturing Company, received the cotton, it would be liable for what it was worth when it received it; but not upon the terms made by an unauthorized agent; to look to the facts and see whether or not, Thompson was a properly authorized agent." This charge the Court refused to give as requested, but changed the request so as to make it read: "If the witness, Thompson, was authorized by W. F. Davis, (who was himself only an agent) to borrow the Perry cotton, then he had no authority to borrow the cotton,

and the defendants would not be bound by the terms of the contract made by Thompson, unless ratified by defendant."

The Court added: "If Thompson was authorized by W. R. Phillips, his acts are binding upon defendant, or binding upon defendants if adopted by the Company."

Defendant's counsel requested the Court, in writing, to charge the jury, 2d, "That if the (defendant) Newton Manufacturing Company borrowed the cotton in question from the plaintiffs, to be returned in kind at a certain place or places when called for by plaintiffs, or to be paid for in money at the option of the plaintiffs, then it devolves upon the plaintiffs to prove that they notified the defendants of their election to take the money instead of the cotton in kind, before they can bring suit; and if it is not in proof that the plaintiffs gave such notice, then they are not entitled to recover. The Court gave the latter request to charge, but added the following: "In addition or qualification or explanation of the request by defendant's attorney, the Court charges you, that if they demanded or requested a settlement of the account sued for before commencement of the action, and defendant refused, it is sufficient notice."

The defendant's counsel requested the Court, in writing, to charge the jury: If the defendant, a corporation, was at the time of the contract, not doing business, had no officers or a board of directors, but had ceased to hold its meetings and to appoint agents or officers, then it was not able to contract, and could assume no liability, and the plaintiffs would not be entitled to recover." The Court refused to give the foregoing request in charge to the jury. Defendant requested the Court, in writing, to charge the jury as follows: A judgment rendered in this case against the defendant would not bind W. R. Phillips or his property. It would only bind the corporation and its property, if it has any."

The jury returned a verdict for the plaintiff for the sum of $3,450 47, principal and interest.

The defendant's counsel moved for a new trial, upon the

grounds that the verdict was contrary to law and the evidence, etc., and that the Court erred in admitting the sayings of Phillips & Davis, because they were not agents of the defendants; in rejecting the evidence of sole ownership in Phillips, and all evidence tending to show dormancy and suspension of the corporation; in each of his charges as stated; in giving each of the requests of plaintiff's counsel, and in each of his refusals or modifications of the requests of defendant's counsel. The new trial was refused and error is assigned on each of said grounds.

J. J. FLOYD, P. L. MYNATT. D. F. HAMMOND, for plaintiff's in error, Corporations cannot act without officers: Ang. and A. on Corp., sec. 771; Grant on Corp., 313, and 316; 3 Watts, 66; 1st Paige, 560; R. Code, sec. 1679; 57 Penn. St. R., 417. One may plead his incapacity: R. Code, sec. 2694. Plea of dormancy not dilatory: 3 Bl. Com., 307; 1 Chitty Pl., 444, 449; Gould's Pl., 41; 39th Ga. R., 186. As to demand: 8th Ga. R., 178; 10th, 560; 2d Par. on Con., 675-6; Chit. on Con., 628. Adoption of contracts: 36th Ga. R., 56. Third charge hypothetical: R. Code, sec. 2153. Estopple: R. Code, sec. 3700; 1 Phil. Ev., 453 *et seq.* Assumed agency: R. Code, sec. 2152, 2156, 2158, 2168; Story on Agency, sec. 45. Principal's knowledge and assent necessary: 14th Ga. R., 136. Ratification: Lou. M. Law, 160; R. Code sec. 2185, 3192; 16th Mass. R., 461; 9th Serg. and R., 212. No proof of prejudice by use of name: 1st Phil. Ev., 460 note; 465 note. This charge distracts jury from issue: 15th Ga. R., 285; 2d, 310. Agency must be established before agent's sayings admissible: 12 Serg. and R., 34; 6th Ga. R., 372, and must be of the *res gestæ*: R. Code, sec. 2180; 26th Ga. R., 111; 29th, 399, 469.

CLARK & PACE, PEEPLES & STEWART, A. M. SPEER, for defendants, furnished no brief to Reporter.

LOCHRANE, C. J.

This was an action brought by the WHITES against the plaintiff in error, for the recovery of certain cotton, alleged to have been received by them under contract. The record is volumnious and embraces the evidence of many witnesses upon questions of fact, found by the jury. We do not propose to review the testimony, as the controlling question of the case turns upon the law governing corporations, and its application to the theory of defense relied on by the defendant below.

The action was brought in the ordinary form of assumpsit, to the March Term of Newton Superior Court. The return of the sheriff upon the 26th February, 1867, is "I have this day served Newton Manufacturing Company with a copy of this writ, by leaving it at their most notorious place of business." At the proper term the defendant appeared by counsel and pleaded the general issue. Upon these pleadings the case went to the jury, and a verdict was found for the plaintiff. An appeal was entered, and when the case came on for trial, the defendant pleaded "that at the time of the several supposed promises and undertakings, etc.: to-wit: in the year 1865, and for several years previous thereto, to-wit: the year 1861, the defendant was not using or exercising any of the franchises conferred by its charter, that it had no officers or agents, appointed in accordance with its by-laws, and was not capable of making contracts or performing any of the functions of its corporate existence, but on the contrary was dormant or in a state of suspension," etc. The Court below held that this plea was filed too late, and disallowed any evidence under it, showing, as a corporation, it was incapable of making the contract or was not operating within the forms of a charter.

The jury found for the plaintiffs, and a motion for a new trial, on several grounds, was made and overruled by the Court, and the case comes before us by exceptions to the judgment of the Court refusing a new trial.

The Newton Manufacturing Company *vs.* White.

This corporation was created under the Act of 1847, Cobb's Digest, 439, and is found under the classification of "Joint Stock Companies." The parties, associating under this general Act of the Legislature, as the "Newton Manufacturing Company," it appears by the record, originally consisted of eight persons, who published, by requirement of the law, their association. In this manner the company began business, and W. R. Phillips in 1863, by purchase of the stock, became exclusive owner and controlled the *Factory*. Did this concentration of the stock in the hands of one single *owner* destroy the *corporate* rights and franchises of the "Newton Manufacturing Company?" Under the peculiar character of this association, under the law, we do not feel authorized to hold that such a purchase necessarily destroyed the franchise; the object of the association was to carry on business under a corporate name; and when we find that the business was continued under that name, no matter whether there was one or one hundred owners of stock, the corporate name was equally within the power of the one as of the one hundred to use and to carry on the business. Nor was it necessary that by-laws in fact should have been made, or officers elected. These powers could or could not be exercised at the option of the owner or owners of the stock, and property of said company. All such rules and regulations for the government of the business was a matter between the parties in interest, and except published or brought to the notice of strangers, did not effect them: Code sec. 1679. And the fact that, in an association under the Act of 1847, one of the stockholders finally buys up and owns all the stock and property of the balance, and the whole lodges in him, does not deprive such person from the use and rights of the charter, to carry on the business, under the name adopted; and the fact of being the sole owner, if he goes on, and uses such *name*, does not abate suits at law or equity filed against such corporation, although individual property. No corporation once legally existing dies, in contemplation of

law, without some act forfeiting its franchises, but it will be recognized by the law, as long as it carries on its legitimate business, in its corporate name, and through agents and persons who use that name in its trade or business. It would be an anomalous doctrine, that one should purchase all the stock of such a joint stock company, privately, and without giving notice of such ownership, should carry on the business, use the corporate name, brands, stamps and trade-marks, and keep books in its name, buy and sell in its name, and be permitted to plead its dissolution, when sued by the very name in which it contracted, in violation of the terms of its existence, that it could sue and be sued by that name. Every corporation speaks by men, and its artificial existence blends with that of its agents and officers. The corporate name is nothing without the living men who use that name; but when used by those who are its proper agents, it is liable by that name to suit under the provisions of its charter. The position this case occupies from the evidence is, that the Newton Manufacturing Company continued to do business, under its corporate name, its agents contracted, in its name, with the plaintiffs, the receipt was in its name, and it was not dead nor dormant so far as the parties to this case are concerned. If it was alive to make this contract, the right of suit continues until the liability is discharged.

If Mr. Phillips had, after his purchase of the stock, done business openly in his own name, this would have ended the corporate name. But from this record he used the corporate name to transact the business. Pennington swears that he gave receipts for Newton Manufacturing Company under the order of Phillips: "he directed me to sign for Newton Manufacturing Company," not for "W. R. Phillips," that he did not want it known that he was the "Newton Manufacturing Company." Every witness in the case substantially sustains this material fact, and we, therefore, are of the opinion that, inasmuch as the Newton Manufacturing Company went on under its name to transact its business, it was liable, in that

name, to sue and be sued, and it was not error in the Court to disallow testimony of its dormancy, under the pleadings.

2. The next question material to the case is whether under the contract as proven, demand and notice of the election was necessary before the institution of the suit. In the view the Court below held of this question we concur, and his charge, in our opinion, left the matter fairly to the jury. His charge was "that if they demanded or requested a settlement of the account sued for before the commencement of the action and defendant refused it, it is sufficient notice." There was testimony on this subject sufficient to invoke the charge and sustain the finding of the jury theron.

Several exceptions to the charge of the Court were made and are assigned as error; but the general prevailing sentiment of exception is based on the first ground we have discussed, and after carefully examining the charge of the Court, under the law and facts of this case, we are satisified that the points in issue were fairly stated for their adjudication, and we are satisfied with the verdict under the rule of this Court so often repeated, that, except in cases where the verdict is decidedly against the weight of evidence, we will not interfere with the province of the jury.

Judgment affirmed.

HARRY CAMP, plaintiff in error, *vs.* JAMES M. PACE, administrator, defendant in error.

A Court of equity will entertain a bill, for the purpose of setting off a debt due on a dormant judgment, when a *scire facias* is pending to revive it, against a judgment which is not dormant, when the plaintiff in the latter judgment, and defendant in the former judgment is *insolvent*; and will enjoin the collection of the judgment which is not dormant until the dormant judgment shall be revived, unless some good legal reason be shown why the dormant judgment cannot be revived. There was no error in the Court below in overruling the demurrer to the

complainant's bill, and this Court will not control the discretion of the Court below on the statement of facts contained in the record, in retaining the injunction until a trial can be had thereon.

Dormant Judgments. Set-off. Equity. Before Judge GREEN. Newton Superior Court. September Term, 1870.

This cause was before this Court heretofore. See Camp *vs.* Pace, 40th Georgia Reports, 45. When the judgment of this Court was made the judgment of the Superior Court, Camp had his *fi. fa.* levied upon the intestate's property. Pace, as administrator, then filed this bill to enjoin said *fi. fa.* until the judgment in favor of his intestate could be revived, and praying that when it was so revived, Camp's *fi. fa.* should be paid by a credit of its amount upon the revived judgment.

Pace averred in addition to the facts stated in the 40th Georgia Reports, 45, *et seq.*, that notwithstanding his intestate's judgment was apparently against Camp as trustee, in fact, it was a judgment against Camp individually, and that Camp and the trust-estate of Camp's wife are both insolvent. The injunction was granted. Camp answered that he was but a security on the dormant judgment which Pace was seeking to revive, and that Pace had allowed said judgment to become dormant, and had thereby given precedence to a judgment of Baker against said trust-estate, and thereby increased the risk of Camp as security on the unrevived judgment and thereby released him. He denied any liability on said judgment except as security for said trust-estate. He charged that when the trust-estate was good and could respond to him as trustee and security, he had offered to have his debt credited on intestate's judgment, but that it was not done, and Pace refused to allow it done, and therefore he claimed that Pace could not have it done now that said trust-estate is insolvent. Further, he said that Pace was estopped by not setting up his defense in the original case against him, and by the fact that intestate took judgment against him, Camp,

as security, and that this matter is *res adjudicata* by the case in 40th Georgia Reports cited *ante.*

Upon the filing of this answer, Camp also demurred to the bill, because there was no equity in it, and, as appears by the face of the bill, the Supreme Court had decided against Pace's right to the relief prayed for, and thereupon Camp moved to dissolve the injunction upon the grounds stated in the demurrer, and upon the grounds that the answer had sworn off any equity in the bill. The Chancellor refused to dissolve the injunction and that is assigned as error.

A. B. SIMS, A. M. SPEER, for plaintiff in error, as to Camp's discharge as a security cited Irwin's Code, secs. 2126, 2130; 3d Kelly, 412, 249; 12th Ga., 276. The whole matter could have been settled at law: Irwin's Code, sec. 3027, and that adjudication at law bars this suit: Irwin's Code, secs. 2896, 3519; 16th Ga. R., 402; 40th Ga. R., 48.

CLARK & PACE for defendant.

WARNER, J.

There was no error in the judgment of the Court below in overruling the demurrer to the complainant's bill, or in refusing to dissolve the injunction until the final hearing of the cause, on the statement of facts contained in the record.

Let the judgment of the Court below be affirmed.

WILLIAM RADEN *et al.*, plaintiffs in error, CALEB THOMPKINS, defendant in error.

When, on the trial of an action of ejectment for the recovery of a tract of land, the main point in controversy was whether the bond for the title under which the defendant claimed was a genuine bond, or a spurious or forged paper title, and the evidence upon that point being conflicting, the jury found a verdict for the plaintiff, there being no error alleged as to the charge of the Court in submitting that question to the jury:

Raden vs. Thompkins.

Held, That a motion for a new trial, on the ground that the verdict was strongly and decidedly against the weight of evidence, and without evidence to support it, and contrary to law and the charge of the Court, was properly overruled by the Court below, there being sufficient evidence in the record to sustain the verdict, of which the jury were the proper judges, and not the Court.

Ejectment. New trial. Before Judge GREEN. Pike Superior Court. October Term, 1870.

In July, 1850, Doe brought ejectment for certain land in said county upon the demises of Edmond Blalock, Jonathan Harkness and Caleb Thompkins against Roe, casual ejector, and William Raden, tenant in possession. The pleas were the general issue and the Statute of Limitations. In April, 1857, there was a verdict for defendant. Plaintiffs moved for a new trial, and in April, 1859, a new trial was granted, upon the ground that the verdict was not authorized by the evidence. At October Term, 1860, there was a new trial. Bloodworth being interested in the land, was made a defendant at April Term, 1867, and then plaintiff had a verdict for the premises. A new trial was granted because of error in the charge of the Court. At October Term, 1869, the cause was again tried. The plaintiff read in evidence a grant of the land from the State to Edmond Blalock, dated the 26th of May, 1823, unrecorded; a deed from Blalock to Johnathan Harkness, dated the 26th of March, 1823; a deed from Harkness to Caleb Thompkins, dated the 27th of March, 1823; showed that Raden was in possession of the premises when the suit was begun, introduced evidence as to *mesne* profits and improvements made by the tenant, and closed. The defendant, after accounting for its loss, read a copy of a bond, dated the 24th of December, 1822, recorded in April, 1867, by which Edmond Blalock bound himself in the sum of $200 00, to William Blalock, to make a title to said land, without stating when it was to be made, or why. It was tested by William Sanders and Laird W. Harris, Justice of the Peace. A witness testified that this was a copy

of the original which was lost in the mail, when attached to a set of interrogatories. Another testified that the original was once in Green's possession and said it looked like an original paper, and that he did not remember whether it had blue lines or not.

Another witness testified that, while he did not know whether the said copy was the copy of a paper shown him years before by Bloodworth, yet he knew that Bloodworth professed to have some interest in this land and showed him a bond for titles, witnessed by said Laird W. Harris, Justice of the Peace, and that the signature of Harris, Justice of the Peace, was his genuine signature, witness knowing it well. But he did not remember whether the bond shown to him by Bloodworth was on blue-ruled paper or not, nor whether blue-ruled paper was in use in December, 1822, nor when it was first used, nor did he remember whether it was on a single leaf or a sheet of paper.

William Blalock testified that he bought the land from his cousin, Edmond Blalock, for $50 00, paid it in cash and took a bond for titles because the grant was not then issued, and that this bond was taken at Stanfordville, Putnam county, and witnessed by William Sanders and Laird W. Harris; that in 1846, he sold the land to James Gardner for $200 00 and turned over Edmond's bond to Gardner, but he did not remember whether it was written on ruled paper. They then read in evidence a deed from William Blalock to said Gardner made the 4th of November, 1846, and recorded in 1854, and a deed from said Gardner to said Bloodworth, dated the 3d of August, 1850, and recorded in October, 1867. There was evidence *pro. and con.* as to the genuineness of the deed from Edmond Blalock. It was shown that in 1822, Edmond Blalock gave in said land and paid taxes on it, and did not give it in afterwards.

The main fight was over said last bond. One witness testified that he saw Laird Harris, J. P., sign as a witness, such a bond as the copy, and it was shown that Harris was com-

missioned a Justice of the Peace in Putnam county, on the 15th of October, 1822.

Hartford Green, Esq., said that the paper which was called the original of the bond was before the jury; first saw it on a former trial, it was then in Court, and witness got Mr. Dismuke to copy it; this is the copy, the paper looked like it was too new as he recollects it, which first excited his suspicions as to the genuineness; he examined it; as well as he recollects it was white paper, with faint blue ruled lines; don't recollect to have seen any paper like it at the time of its date.

Thomas Richards, examined by interrogatories, said, I have no knowledge or recollection of ruled paper being sold unbound previous to the year eighteen hundred and twenty-seven; at that time I sold some foolscap and letter paper, which I sold by the quire, in this city, all kinds of paper was then unruled, never knew of any being in market otherwise until some few years afterwards, when it gradually got into general use in the United States; I have been engaged in the business of bookseller, stationer and book-binder in this city, since the year 1823; at that time I ruled paper with blue and red lines for blank books with a machine. This machine had been used a few years previous by some other person or persons, but to a very limited extent; at that time there was another ruling machine in use by Col. Williams, of Savannah, but not to my knowledge used for any other purpose than ruling paper with blue and red lines for blank books; the machine had not been known in the United States but a few years prior to that time—previous to which nothing was ruled save books, which had date lines, and lines for dollars and cents, which being all done with a single pen, and necessarily tedious, books were ruled with red lines only; neither books nor paper was ruled with blue lines until the ruling machine owned by Col. Williams and myself got into use, and I never heard or knew of paper ruled with blue lines being sold by the quire or ream, either

here or any other place, until a few years after I had done so in this city.

The Court charged the jury, among other things, that if William C. Blalock bought and paid for the land, and took a bond for titles from Edmond Blalock, in 1822, and before Jonathan Harkness purchased the land, this constituted a good title in William C. Blalock on the instant the grant was issued, and they should find for the defendant, unless the deed to Jonathan Harkness was a *bona fide* deed from Edmond Blalock, and the bond to William C. Blalock was a forgery, in which event they should find for the plaintiff. If the bond to William C. Blalock and the deed to Jonathan Harkness are both genuine papers, then the oldest title must prevail, unless the deed to Harkness was duly recorded in twelve months, in which event plaintiff is entitled to recover. Plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, for it is immaterial what the character of defendant's title is; he being in possession, cannot be disturbed by any one unless he has a good title.

The jury returned a verdict finding for the plaintiff without *mesne* profits, with costs of suit, and defendant moved for a new trial, upon the following grounds, viz:

1. Because the verdict is contrary to law and equity.

2. Because the verdict is strongly and decidedly against the weight of evidence, and without evidence to support it, and against the charge of the Court.

The new trial was refused and error is assigned on said grounds.

PEEPLES & STEWART, E. G. CABANISS, D. N. MORTON, for plaintiff in error said, a bond for titles with the purchase-money paid was title: 3d Kelly, 5; 10th Ga. R., 190; 12th, 464; 24th, 150; 26th, 177; 22d, 112; 25th, 648; 35th, 63. After the draw and before the grant equitable title is in drawer, and the legal title in the State for drawer's use, and

this equitable title is transferable: 22d Ga. R., 112; 23d, 383; 24th, 150; 26th, 177; 29th, 1; 27th, 418. The bond being older than the deed, and neither being recorded in twelve months from date, the oldest takes: Prince's Dig., 158, 160, 162; Cobb's Dig., 175; 33d Ga. R., 231.

A. M. SPEER, E. W. BECK, L. T. DOYAL for defendant.

WARNER, J.

There was no error in the Court below in overruling the motion for a new trial in this case. The evidence as to the validity of the bond was *conflicting*, and the jury were the exclusive judges as to the credibility of the witnesses and as to the weight of their evidence.

Let the judgment of the Court below be affirmed.

JOHN H. LYON, plaintiff in error, vs. DUKE WILLIAMS, defendant in error.

1. Counsel being authorized by the defendant to defend the suit, it was the duty of the defendant to have put his attorney in possession of such matters of defense as he conceived to exist in defense thereto, and a confession of judgment by counsel representing the case, with the knowledge and at the instance of the party, is sufficient in law without any special authorization to that effect; it followed as a legitimate incident of his professional relation to the case.
2. Under the pleadings and facts of this case, the facts in controversy were properly submitted to the jury, and the charge of the Judge was a clear statement of the law governing it; "that if the administrator had charged himself with the debt, and became liable therefor, then the original debt was extinguished, and the note given to him individually was a novation, the consideration of which was the money advanced." And there being sufficient evidence to sustain the charge of the Court, and the verdict of the jury, the Court below refusing a new trial, ought not to be interfered with or set aside.
3. It is only in cases where there has been no novation of the contract, and the consideration is a slave or the hire thereof, that the Courts of this State are inhibited from exercising jurisdiction under the Consti-

tution. But when payments have been given upon notes given since June, 1865, questions of fact arising under the pleadings upon suits brought to enforce such debts, when such consideration is denied and issue joined thereon, are the subject matter of judicial investigation to be submitted to a jury, upon evidence admitted under the rules of law.

Principal and Agent. Attorneys at law. Novation. Slave debts. Before Judge GREEN. Upson Superior Court. November Term, 1870.

The facts of this cause are in the opinion. When it was called here, counsel for defendant in error moved to dismiss the bill of exceptions, because the contest was as to whether this were a debt for the hire of slaves and, therefore, this Court had no jurisdiction to hear it under the constitutional prohibition of jurisdiction over such debts. The motion was overruled.

DOYAL & NUNNALLY, for plaintiff in error.

SMITH & ALEXANDER, JOHN I. HALL, for defendant.

LOCHRANE, C. J.

In this case it appears that Williams brought his action against Lyons on a promissory note for $136 80, to the May Term, 1867, of Upson Superior Court. At the term following, judgment was confessed by Bell and Spivey, defendant's attorneys, and judgment entered up. Subsequently a rule *nisi* was granted by the Court, served upon the plaintiff, calling on him to show cause why the judgment should not be set aside on the ground that it was improvidently confessed without knowledge by said attorneys that the note, the foundation of this action, was given in renewal of a note, the original consideration of which was the hire of a slave. Williams answered the facts stated in the motion and rule nisi, alleging that they were untrue. Defendants joined issue, upon which the case went to the jury upon the following statement of facts: Lyons, the maker of the note, stated

that he hired a negro from Williams, as administrator of David Kendal, deceased, in 1861 or 1862, for $125 00. He offered to pay Williams in Confederate money, which he was unwilling to take, Williams agreeing not to charge interest on the amount which was agreed to, and in 1866, Williams came to witness and requested him to give him a new note, stating that the first had been lost while in the hands of Mr. Lyons for safe keeping, and that he had made a return of said note as administrator and was liable thereon. Under this statement the note sued on was given and the interest from the demand added. The note was given to Williams individually. General Bell stated that Lyons, the defendant, was his son-in-law; that he told him of the suit and that he would attend to it, to which he assented; that he did not know the consideration was negro hire; that he filed no plea and confessed judgment; that he was not authorized to make the confession, and that he would not have confessed if he had known this defense. The jury found the issue in favor of Williams, the Judge charging them, that if they believed defendant gave the substituted note now sued on to Duke Williams, because Duke Williams had paid said note to the estate of David Kendal, deceased, or the amount thereof, then the defense set up could not be maintained, because the note was not, in that event, given for negro hire, but in settlement of money advanced, or laid out and expended for the defendant. A motion was made for a new trial in this case, upon the following grounds: 1st. Because the Court erred in refusing to open the judgment upon the testimony of Bell before submitting the same to the jury. 2d. Because the Court erred in permitting the verdict to go against the defendant, under the facts in this case. 3d. Because the charge of the Court was error. 4th. Because the verdict was contrary to law. 5th. Because it was contrary to evidence. The Court overruled the motion for a new trial, and this judgment is the error complained of.

1. We are satisfied, from the record in this case, that the

Court committed no error in refusing to open the judgment upon the testimony of Bell, as it appears from the record that he was authorized to defend the suit, having called the attention of the defendant to it. It was his duty to have put in the knowledge of his counsel such matters of defense as he conceived to exist against such suit. A confession of judgment by counsel representing the case, with the knowledge and at the instance of the defendant, is sufficient, in law, without any special authorization to that effect, and we do not hold that it was error in the Court to refuse to set aside a judgment on the ground of improvident confession, under the facts as stated.

2. Certainly it was not error in the Court to refuse to give judgment upon the facts controverted, as to the merits of the defense in this case, upon an *ex parte* hearing, where issue had been joined and the verdict of the jury invoked by the pleadings; nor was it within the inhibition of the Constitution of this State to submit the question of fact, upon issue joined, to the jury, who were alone authorized, except by consent of the parties, to find the facts of the case.

3. Again, and in regard to the main, controlling question of this case, we think the testimony sufficient to have invoked the charge of the Court; for, as to the charge itself, there is no doubt as to its clear statement of an unquestioned principle of the law. If the administrator had charged himself with this debt, either paying or becoming liable in his official and fiduciary capacity to pay the original debt to the estate, then such debt is extinguished, and its original consideration is no longer a matter of judicial interpretation or controversy, and the note given to him individually, under the well settled rules of law heretofore adjudicated by this Court, was a novation, and the note given was based on the consideration of the liability of money advanced by such administrator to the estate of Kendal. In considering the facts developed by the testimony, we have arrived at

the conclusion that there was sufficient testimony submitted to the jury to have authorized the charge of the Court and invoked their judgment; and it follows, as a consequence, that their finding, under the established rulings of this Court, ought not to be interfered with by the Court below, and his judgment refusing a new trial thereon will not be reversed by this Court. It is only in cases where there has not been a novation of contract, and the question of consideration was a slave or slaves, or the hire thereof, *apparent or uncontradicted*, that the Courts in this State are deprived of jurisdiction, by the Constitution, to give judgment or enforce the debt. Where judgments have been obtained upon notes given since June, 1865, questions of fact arising under the pleadings, upon suits brought to enforce such debts, when such consideration is denied, and issue joined thereon, are the subject matters of judicial investigation, to be determined by a jury, upon the admission of testimony, under the rules of law.

Judgment affirmed.

JAMES H. BEALL, plaintiff in error *vs.* OLIVER C. HILL, defendant in error.

An affidavit was made before a Judge of the Superior Court, on the 15th of November, 1869, to obtain a distress-warrant for rent not due, alleging that Hill, the tenant, was justly indebted to Beall, the landlord, the sum of $220 00 for the rent of thirty acres of land, that the rent note was not due until the 15th day of December, 1869; but that Hill, the tenant, is removing, and has removed, a large portion of his crop from the land, the said note being unpaid. Hill, the tenant, filed a counter-affidavit, in which he simply alleged that the sum distrained for rent was not due, without negativing the fact that he was removing the crop made on the land. On the trial of the case, the plaintiff's counsel demurred to the defendant's affidavit as being insufficient in law, and moved the Court to dismiss the same, which motion the Court overruled. Afterwards, on motion of defendant's counsel, the Court

dismissed the plaintiff's affidavit, on the ground that a Judge of the Superior Court was not authorized by law to issue a distress-warrant:

Held, That the Court erred in not sustaining the plaintiff's demurrer to the defendant's affidavit and dismissing the same, as it did not deny the fact alleged in the plaintiff's affidavit, that he was removing the crop from the land, which was the sole ground for taking out the distress-warrant against him by plaintiff under the 2259th section of the Code. If the question as to the authority of the Judge of the Superior Court to issue a distress-warrant, was now an original question before this Court, we should be inclined to hold that he did have such authority under the general powers conferred upon that officer, by the Constitution and laws of the State; but the decisions of this Court in *Holland vs. Brown*, 15th Georgia Reports, 113, and *Keaton vs. McDonald*, 24th Georgia Reports, 166, limit the authority to issue such warrants to a Justice of the Peace; the 4th section of the Act of 1856–66 applies only to the question of tenants holding over, and not to the question of issuing distress-warrants for rent:

Held, That the distress-warrant issued by the Judge of the Superior Court was properly dismissed by the Court below.

Distress-Warrants. Before Judge GREEN. Upson Superior Court. November Term, 1870.

In November, 1869, Beall made affidavit before the Judge of the Superior Court of said county, that said Hill owed him $220 00 on a note for the rent of certain land therein described, "which said note is not due until the 15th day of December, 1869, but the said Oliver C. Hill is now removing and has removed a large portion of his crop from said land." Thereupon the Judge issued a distress-warrant against Hill for said sum. Hill met this warrant on the 19th of November, 1869, with a counter-affidavit, in which he swore only that said amount "is not due." He gave bond as required by law, and the papers were returned to the Superior Court.

When it came on for trial, Beall's attorney moved to strike the counter-affidavit because it did not deny the removal of goods or that the rent would be due on the 15th of December, 1869. The Court overruled this motion, and ordered the cause to proceed. Subsequently Hill's counsel moved to

dismiss the distress-warrant because a Judge of the Superior Court had no right to take said affidavit and issue a distress-warrant. Thereupon the Court dismissed Beall's proceeding. The refusal to strike the counter-affidavit and the dismissal of the distress-warrant are assigned as error.

JOHN. I. HALL, for plaintiff in error, said the counter-affidavit was bad: Irwin's Code, section 2259; 34th Ga. R., 178; 37th, 66; and Judges of Superior Courts could issue distress-warrants in November, 1869: Acts 1865–6, page 35.

HART & ALLEN; R. P. TRIPPE, by DAVID LEWIS, for defendant.

WARNER, J.

In our judgment the Court below erred in not sustaining the plaintiff's demurrer to the defendant's counter-affidavit. If the question as to the authority of a Judge of the Superior Court to issue a distress-warrant for rent, was now an original question before this Court, we should be inclined to hold that he did have such authority under the general powers conferred upon that officer by the Constitution and laws of the State, but the decisions of this Court in *Holland vs. Brown*, 15th Georgia Reports, 113, and *Keaton vs. McDonald*, 24th Georgia Reports, 116, limit the authority to issue such warrants to a Justice of the Peace. The 4th section of the Act of 1865–6 applies only to the question of tenants holding over, and not to the issuing distress-warrants for rent. According to the previous rulings of this Court, the distress-warrant issued by the Judge of the Superior Court was properly dismissed.

Let the judgment of the Court below be affirmed.

Ellis *vs.* Rachels *et al.*

SAMUEL D. ELLIS, trustee, plaintiff in error, *vs.* MILTON R. RACHELS *et al.*, defendants in error.

When, in 1858, Nathan Truitt died, leaving a will in which he bequeathed to be B certain negroes, (described as old and faithful slaves,) and certain other property in trust, directing that B should permit them, as long as any of them wish, to cultivate, for their support, a certain parcel of land, and see to it that they were well treated, and provided that, at B's death, before the death of all the negroes, the trust should pass to C, and after the probate of the will, no action was taken by B in the matter, and the negroes and other property passed in the usual course of administration to the residuary legatee, and since the emancipation of the slaves, B filed a bill to set up the trust:

Held, That the bill was properly dismissed by the Chancellor for want of equity.

Where the record failed to reach this Court in time for its regular term, by reason of the sickness of the family of counsel for plaintiff in error, a motion to dismiss it, because not here in time, was overruled and the cause was ordered to be docketed for the next term. (R. See end of Report.)

Emancipation. Wills. Before Judge BIGBY. Troup Superior Court. November Term, 1869.

On the 18th of December, 1858, Nathan Truitt of said county, made a last will and testament, by which he disposed of most of his property to his wife and his daughter, Mrs. Willis. The third item of said will was in these words:

"I give and bequeath unto my beloved and trusty friend, Samuel D. Ellis, my old and faithful slaves, to-wit: Jim, Sam, George, the blacksmith, Cyrus, London, Isaac, Nancy, Fanny, Melly, Jinny, and Harlow, together with three good mules, and a good two horse wagon, six months supply of provisions, and two hundred acres of land of the Hopson place, to be selected by him; which said negroes and other property are to be delivered to the said Samuel D. Ellis, after the death of my wife Elizabeth Truitt; and I do hereby give and bequeath it to him, in trust, and for the purpose hereinafter specified to-wit; the said negroes I give to him for the purpose of providing for and taking care of them

during their natural lives, with the right of using and cultivating the said land, and other property so given for the benefit, use and support of said slaves, the said slaves to be kindly treated by him and to work and cultivate said land for their support. And if said two hundred acres should not be sufficient to support said negroes, I desire that the said Saumel D. Ellis shall cultivate with said negroes as much more of said Hopson place as will be sufficient for that purpose. And, in the event of the death of the said Samuel D. Ellis, before all of said negroes shall depart this life, then it is my will and desire that my nephew, James Truitt, shall take and hold said negroes, land and other property given to the said Ellis for the same purpose."

Nathan Truitt died, and said will was probated in 1859, in said county. In February, 1869, said Ellis, as trustee for said slaves, filed his bill in said county, against Rachels, (who had married Mrs. Willis,) and the other persons in interest. He set forth said will, and averred that said third item was made for the purpose of providing for said slaves without hard labor, and for "making their condition as comfortable as possible, and their descent to the grave in their age, as easy as their infirmities would permit and unfavorable legislation would authorize, in recompense for the labor of their youth and prime, which laid the foundation of the immense estate." It averred that testator's wife died "in the year 1860," that Rachels, "after marrying with Mrs. Willis," settled with testator's executor and took charge of the whole estate for the benefit of the parties in interest, and that neither the executor nor Rachels had or would deliver to him, as such trustee, said property by said item conveyed, nor allow him to select said land for said purpose. Setting out the value of said property, and claiming interest on that value from the death of testator's wife, and the right to make said selection, he concluded with a prayer for a decree against the defendants to secure the said rights of said negroes.

The defendants demurred, saying there was no equity in said

bill, because said item was void under the Act of 1818, forbidding *intra-territorial* manumission of slaves in this State, and "for divers other good causes of demurrer appearing in said bill," and prayed that the bill should be dismissed. The other grounds insisted upon in argument below and here, were that if the bequest was good, Ellis had no title, because, by emancipation in 1865, his trust was executed and the negroes should sue in their own names, and because it did not appear that said negroes were living, or if living, wished to have said property and work said land for said purposes.

The Chancellor sustained the demurrer, and dismissed the bill, upon what ground does not appear. The dismission of the bill is assigned as error.

(NOTE. This bill of exceptions was filed in the Court below on the 15th of April, 1870. It had not been sent up to June Term, 1870. Then a motion was made to compel it to be sent up and enter it upon the docket of that term, and dismiss it, because it was not sent up in time. Upon showing by Mr. Walker that the delay was caused by sickness in his family, the motion was overruled, and the case was ordered on the docket of the next term.)

J. S. WALKER. B. H. BIGHAM, for plaintiff in error. The will conforms to the policy of the State: Old Code, secs. 1854, 1855, 1859; 18th Ga. R., 563; 14th, 2612. It is not against Act of 1818: Charl. R., 548; 4th Ga. R., 75; 6th, 539, 47; 4th, 446; 10th, 263, 265; 34th, 458, 476, 477; 21st, 38. Cases in 14th, 18th, 20th, 23d, 25th, and 26th Ga. R., not at war with this principle: 38th Ga., 655.

FERRILL, HAMMOND & BROTHER for defendant, as to policy of the State against intra-territorial manumission, cited Acts 1801, 1803; Prince's Dig., 787–8; Act of 1818; Prince's Dig, 795, or Old Code, secs. 1875–6, and extra-territorial Acts 1859, page 68; R. Code, sec. 4984: 38th Ga. R., [illegible]; 40th, 18, and same case this term. Testator's death

fixed the law of complainant's right: 18th Ga. R., 1; 25th, 660, 650.

McCay, J.

Very clearly, Mr. Ellis has no claim in his own right, under this will. If the provisions of the clause referred to can be carried into effect at all, it would be a most glaring perversion of the intent of the testator, to permit his bounty to go to the individual use of the trustee, who was clearly only looked upon as a mere agent. The testator only casts the duty upon him after the death of his own widow. If the trustee dies he provides for a successor.

We are not sure that this will was void, *ab initio*, as against the policy of the Acts, then in force, prohibiting domestic emancipation of slaves. We are inclined to the opinion that it rather comes within that class of cases which are only instances of the mode in which the testator intends that the duty of every master to old and infirm slaves shall, in his case, be performed. Here were, without doubt, infirm and helpless slaves, whom it was the duty of the testator to take care of while he lived, and whose support was a legal charge upon his estate at his death. Why should he not provide a mode of his own choosing by which that charge should be executed? Clearly, in doing this, he must not make the slaves practically free. But does he do this? He sets aside the use of certain lands, he names the slaves by name, including with those who are infirm some that are able to work. He provides provisions, tools, etc., and directs that the agent or trustee keep them on the place, work them, *direct* and *control* them. They are to be *compelled*, as a body, to earn their own support. We can easily conceive that, under certain very usual circumstances, this might have been a very legitimate mode of performing the duty which every man, both by the laws of humanity and by the laws of the State, owed to his infirm slaves.

But admitting that this might, under certain circumstances, have been a legal will, we think, for that very reason, it cannot now be enforced.

These negroes are now free. The duty—*the legal* duty—of the master to them has ceased; his *mode* of performing that duty was to put them in charge of a *trustee*, who should control them, *compel* the strong ones to work for the weak, and to act as a *master* over them all. This is now impracticable. They are, by *law*, their own masters. They cannot, by the trustee, be *compelled* to work. Nor is it probable that the strong ones will now be willing to work for the support of the weak and infirm; and, yet, this was the scheme of the testator, if it was legal.

If, on the contrary, his scheme was to make them practically free; to permit each one to do as he pleased, and *to enjoy the proceeds of his own labor*, then the will was illegal; and having been illegal then, it is illegal still. In either view of it, this provision of the will cannot be enforced, and we, therefore, think Judge BIGBY did right in sustaining this demurrer.

Judgment affirmed.

P. B. HALL, plaintiff in error, *vs.* VIVIAN HOLMES AND WIFE, defendants in error.

A tenant rented a hotel for one year, agreeing to pay sixty dollars per month rent therefor, payable monthly in advance, and after occupying the premises about five months the landlord took out a warrant for the removal of the tenant from the premises for the non-payment of rent due, under the provisions of the 4005th section of the Code; whereupon, the tenant filed his bill on the equity side of the Court, alleging that the rented premises were not tenantable, and in consequence of the failure of the landlord to keep the rented premises in a tenantable condition, that he had been damaged in the sum of thirteen hundred dollars; that the landlord was insolvent, and that the tenant was unable, on account of his poverty, to give the bond and security on filing

a counter-affidavit as required by the 4007th section of the Code; and prayed an injunction restraining the landlord from turning him out of the possession of the premises, until the final hearing of the bill, offering to deposit the monthly rents in the hands of a Receiver to be appointed by the Court. On a demurrer being filed to the complainant's bill, the Court sustained the demurrer, and dismissed the same:

Held, That taking the allegations in the complainant's bill to be true, that the consideration for which the rent notes were given had failed, there was no rent due the landlord, and his remedy to prevent a removal from the premises was under the provisions of the 4007th section of the Code. Inasmuch as there is no provision made, in the existing laws of this State, to dispense with the bond and security required of the tenant on account of his poverty, a Court of Equity cannot make such an exception. Equity follows the law but does not control or override it. The requirement of the law, that the tenant shall give bond and security to prevent an eviction from the rented premises, is as binding upon a Court of equity as a Court of law in such cases. The demurrer to the complainant's bill was properly sustained for want of equity.

Landlord and Tenant. Rent. Equity. Before Judge BIGBY. Troup County. Chambers. September, 1870.

Hall's bill against Holmes and wife, filed in July, 1870, made this case: He rented from Holmes, as agent of his wife, the LaGrange Hotel, at $720 00 *per annum*, payable in monthly installments of $60 00, upon condition that Holmes would repair the premises, the garden, negro quarters, and especially the roof of the hotel, then evidently in a leaky condition. All that time Hall was in charge of a large, first-class boarding house. Relying upon said promises, he moved into said hotel, taking with him some of his old boarders and receiving others up to the number of forty-three, telling them of said promises and that he could make them comfortable. He exhibited the contract, which was in writing, but contained nothing about repairing said premises, but only a promise by Holmes to give him possession on the first of January, 1870, and his promise to pay rent as aforesaid. But he averred that it was understood that the repairs were to be made, notwithstanding. This contract was made on the 27th of November, 1869. And he exhibited a letter

from Holmes to him in April, 1870, asking him to get shingles for repairing said roof, and a letter from Hall to Holmes on May 26th, 1870, saying that the work done had not stopped the leaks, but thirteen of the fifteen rooms leaked, and his furniture was being damaged and his boarders would quit unless it was remedied, and threatening to sue Holmes if he did not comply with his promise.

Hall paid the rent up to the first of May. Subsequently, he was garnisheed by one who had a judgment against Holmes for slander. Upon Hall's importunity, the roof was patched, but in such way as not to make it good, but only to annoy him and injure his business. Some of the rooms were still untenantable in rainy weather.

Holmes and his wife are insolvent. Yet, knowing these facts, fraudulently, on the 15th of June, 1870, Mrs. Holmes sued out a distress-warrant for rent and a proceeding to put Hall out of said premises for non-payment of rent. Hall gave bond and stopped the proceeding. This he was enabled to do only by a conditional sale of part of his bedding and furniture. He cannot give another bond. And yet, to-day, another month's rent is claimed to be due, and Mrs. Holmes threatens like proceedings as to it, and also to garnishee his boarders, and to do this month by month, and will thus break up Hall's business. He was known to be unable to give security when the contract was made, and these small and summary suits are to worry him, fraudulently, into a payment of the rent.

He proposed to pay the rents as they fell due, (provided the garnishment on him be dissolved) to such Receiver as the Chancellor might appoint, to apply it to the repair of said premises, according to said contract. He prayed for injunction against further such warrants, and proceedings to eject him, and garnishments, until the first case might be decided, in which he had pleaded his damages and hoped to get judgment therefor. As an additional reason, he averred that his wife was unable to walk. The damages claimed by

Hall were as follows: "By loss of boarders and custom, $700 00; by injury to carpets, beds, bedding, clothing and furniture, temporary repairs during rains and preparations to catch water leaking, $600 00;" total, $1,300 00.

The Chancellor ordered said proceeding to stop for the present, and that defendants show cause, on a day during the adjourned term in July, why said injunction should not be granted as prayed for. The cause was postponed till September, and then heard upon a motion to dismiss the bill, because Hall's remedy at law was complete.

The Chancellor dismissed the bill and refused an order, asked by Hall's counsel, for suspending his judgment to give time for a writ of error. They say the Court erred in dismissing the bill and refusing said order.

BIGHAM & WHITAKER; SPEER & SPEER, for plaintiff in error, said Holmes could not compel payment of rent till said repairs were made: 17th Ga. R., 343; 21st, 430; 39th, 215. He and his wife were liable for damages to Hall: 30th Ga. R., 869; Code, sec. 2258. Only defense to distress-warrant is counter-affidavit and security: 15th Ga. R., 301; 19th, 534. Injunction then is proper remedy: 35th Ga. R., 148; 40th, 293.

MABRY, TOOLE & SON, for defendants.

WARNER, J.

There was no error in the judgment of the Court below in sustaining the demurrer to the complainant's bill. Inasmuch as the law makes no exception as to the eviction of a tenant who is unable to give bond and security on account of his poverty, a Court of Equity cannot make one, but is as much bound, by the positive law of the land in such cases, as a Court of law would be. Equity follows the law, where the rule of law is applicable, and the analogy of the law, where no rule is directly applicable: Code, 3028. The statute law

of the State, in relation to landlord and tenant, cannot be altered or changed by simply changing the forum in which the remedy is sought.

Let the judgment of the Court below be affirmed.

THOMAS J. JACKSON, plaintiff in error, *vs.* FRANCIS M. SCROGGIN, defendant in error.

Inasmuch as the evidence disclosed by the record does not show any evidence of title which, in law, would have entitled the plaintiff to recover the premises in dispute from the defendant, the non-suit was properly awarded by the Court below.

Ejectment. Non-suit. Before Judge BIGBY. Coweta Superior Court. September Term, 1870.

This was ejectment by Jackson against Scroggin. On the trial, the plaintiff's counsel read in evidence a deed from one Carpenter to one Arrington, made the 10th of August, 1851, with the understanding that he would show that said deed covered the premises in dispute. He then offered in evidence a deed from Arrington to Jackson, which had not been recorded, and it was read with the same understanding as to necessity of identification of premises. There was no other evidence of title, except some as to identification, as alluded to above, and none of possession by plaintiff under said deeds, except for a time in 1851, if then. Upon motion of defendant's counsel, a non-suit was granted. That is assigned as error.

J. B. DAVIS, for plaintiff in error.

HUGH BUCHANON, for defendant.

WARNER, J.

There was no error in the judgment of the Court below in granting the non-suit on the statement of facts disclosed by the record.

Let the judgment of the Court below be affirmed.

WADE WHITE, plaintiff in error, *vs.* E. D. BLASLAND, for use, etc., defendant in error.

A suit was instituted for the recovery of the amount due on two promissory notes, or written obligations, made by the defendant, one of which was for the sum of $282 10, dated 8th August, 1868, due eight months after date, the other for the sum of $425 00, of the same date, due, on demand, after one year's time after the date thereof. When the case was called for trial, the defendant moved to continue the same, which motion was overruled by the Court. The plaintiff then offered as evidence the two notes or written obligations, and proved by plaintiff's attorney that some time after the expiration of twelve months from the date of the last named obligation, (the exact time not stated) he made a formal demand of the defendant for the payment thereof, which he declined to do, and thereupon closed his case, and the defendant introduced no evidence. The jury returned the following verdict: "We, the jury, find for the plaintiff seven hundred and seventy-one dollars and forty cents principal, with interest and costs of suit." The defendant moved for a new trial, on the ground of the refusal of the Court to continue the case, and because the verdict of the jury was contrary to law, and against the evidence, which motion the Court overruled, and the defendant excepted:

Held, That the reasonable intendment of the verdict is that the jury found for the plaintiff the principal sum due on the two notes or obligations sued on, with interest thereon from the time the same became due.

And that there was no error in the Court below in overruling the motion for a continuance of the case, on the showing made therefor, (to-wit: that defendant was absent, when it was not shown what he would testify to if present. R.)

Held, further, That the judgment of the Court below be reversed and a new trial be granted, so as to allow the verdict to be corrected, in accordance with the reasonable intendment and construction thereof;

unless the plaintiff shall consent to enter up his judgment thereon for the sum of $707 10 for his principal debt, with interest thereon from the time the same became due, the interest to be calculated on the obligation payable on demand, from the 14th day of September, 1869, the date of the commencement of the suit; and upon the plaintiff consenting to do so, that the judgment of the Court below stand affirmed.

Verdict. Interest. Continuance. Before Judge BIGBY. Carroll Superior Court. August Term, 1870.

Edward B. Blasland, for the use of Thomas Blasland, on the 14th of September, 1869, sued White upon his note made the 8th of August 1868, due eight months after date, for $325 00, (on which $42 90 was paid on the day it was made) and on another paper made the same day, as follows: "I, Wade White, do hereby obligate myself to Edward B. Blasland, in case he shall not deem it for his interest to come back to Villa Rica, to pay him, on demand, after one year's time, the sum of four hundred and twenty-five dollars, also half the profits of Stamp Mill, now owned by him, from date, less half the expenses," both payable to Edward B. Blasland. The defendant pleaded that he paid $100 00 to Edward B. on the 8th of August, 1868, which should be credited on said demands; that Edward B. owed him $100 00 for wood, etc., $168 62 for his half of said expenses, etc.

When the case was called for trial, defendant's counsel moved to continue because of the absence of defendant, and of the interrogatories of a witness. It was not shown what the defendant would testify to, nor was any reason for his absence, satisfactory to the Court, given. As to the interrogatories, it appeared that the commission issued in January then last past, but they had not been handed to any commissioners to execute. The continuance was refused.

Plaintiff's counsel read said note and paper in evidence, and a witness testified that "some time after the expiration of twelve months from the date of said papers" he demanded payment; that the defendant said he would pay soon, but claimed that he ought to be allowed a credit of $10 000.

There was no other evidence. The jury found for plaintiff $771 40 "principal, with interest" and costs. Judgment was entered for $771 40, "principal and interest up to date," and costs. Defendant's counsel moved for a new trial because the verdict was contrary to law and evidence, and because said continuance was refused. The Court refused a new trial, and that is assigned as error.

THOMAS W. LATHAM, by WILLIAM EZZARD for plaintiff in error.

W. W. MERRILL, NEWMAN & HARRISON, for defendant.

WARNER, J.

There was no error in the refusal of the Court to continue the case on the showing made therefor. The judgment of the Court below must be reversed and a new trial granted, so as to allow the verdict to be corrected in accordance with the reasonable intendment and construction thereof; unless the plaintiff shall consent to enter his judgment thereon for the sum of $707 10 for his principal debt, with interest thereon, from the time the same became due, the interest to be calculated on the obligation payable on demand, from the 14th day of September, 1869, the date of the commencement of the action.

Let the judgment of the Court below be reversed on the terms stated in this opinion.

Calhoun *vs.* The Mayor and Council of Atlanta.

J. P. CALHOUN, for use of, etc., plaintiff in error, *vs.* THE MAYOR AND COUNCIL OF ATLANTA, defendant in error.

When the plaintiff obtained a verdict against the defendant for the sum of $99 45, and a judgment was entered thereon by the plaintiff's attorney, leaving the amount of the costs to be recovered in blank, to be taxed by the Clerk, and afterwards the plaintiff and defendant agreed to settle the judgment under the following circumstances: "It is agreed between counsel for plaintiff and defendant, that defendant declines to settle the above stated case if the defendant has to pay the costs of plaintiff's witnesses; that defendant would settle if plaintiff would receipt the judgment in said case as follows: Received of the defendant $106 00, in full of the within judgment; that said receipt was given as demanded by plaintiff, and the principal and interest paid in full, the Clerk's costs having been previously paid; that at the time plaintiff's counsel refused to agree that plaintiff should be liable for any costs, defendant's counsel stating that he would risk the receipt as above described." Afterwards, a motion was made by the plaintiff to enter a judgment *nunc pro tunc* for the use of his witnesses for the cost due them, which motion was refused by the Court, whereupon the plaintiff excepted:
Held, That it was the right of the plaintiff to have had all the legal costs due in the case, including the costs of plaintiff's witnesses, taxed by the Clerk, and inserted in the blank left in the judgment for that purpose, and to have proceeded to collect the principal, interest and cost, by due process of law, but, inasmuch as the plaintiff agreed to settle the judgment on the terms proposed by the defendant, with a full knowledge of all the facts, and gave a receipt in full of the within judgment, there was no error in the refusal of the Court to allow the motion to enter a judgment *nunc pro tunc* against the defendant for the costs due the plaintiff's witnesses.

Costs. Estoppel. Judgments *nunc pro tunc*. Before Judge LOCHRANE. Fulton Superior Court May Term, 1871.

In May, 1869, Calhoun obtained a verdict against the Mayor and Council of Atlanta, for $99 46, and entered judgment thereon for said sum as principal, and for "$—— for his costs in this behalf expended," etc. The defendant sued out a writ of error to this Court. Pending that writ of error, the parties were in treaty as to settling the case. Defendant would not agree to pay the fees of plaintiff's wit-

nesses, but said he would pay if plaintiff would receipt the *fi. fa.* as follows: "Received of the defendant the sum of $106 00, in full of the within judgment." Plaintiff's counsel refused to agree that plaintiff should pay his own witnesses' fees. Defendant's counsel replied that he would pay said amount, $106 00, (which was in full of principal and interest,) if said receipt was given, and would risk the effect of the receipt. The receipt was then signed, and the $106 00 was paid. Afterwards, plaintiff's counsel brought the foregoing facts to the notice of the Court and prayed to fill said blank in the judgment for costs, *nunc pro tunc*, with the sums due by plaintiff for the fees of plaintiff's witnesses.

Besides the above, it was agreed that the Clerk's costs had been paid, and that no costs were entered into said judgment or *fi. fa.*, though the witnesses had proved their subpœnas, and delivered them to the Clerk on the day that the judgment was entered up, and before the *fi. fa.* was issued. And it seems to have been conceded that these witnesses were sworn on the trial. The proceeding was in the name of the plaintiff, for the use of the witnesses named in the motion. The Court overruled the motion, and that is assigned as error.

T. P. WESTMORELAND, HILL & CANDLER, for plaintiff in error, said costs should be entered in the judgment: R. Code, secs. 3635, 3625. As to power of Courts to correct judgments: Secs. 194, 3448, 3449, 3444, 3447, 3450; 1st Kelly, 469 and 92.

W. T. NEWMAN, City Attorney, for defendant. Plaintiff personally liable to his witnesses: R. Code, sec. 3789. When he got judgment he had right to enter therein the amount of the witnesses' fees: Secs. 3635, 3500. There is no privity between plaintiff's witnesses and defendant. They can proceed in their own names against defendant, and plaintiff said settlement estops him from doing so.

WARNER, J.

On the statement of facts disclosed by the record in this case, there was no error in the refusal of the Court to allow the motion to enter a judgment *nunc pro tunc* against the defendant for the costs due the plaintiff's witnesses.

Let the judgment of the Court below be affirmed.

A. K. SEAGO, plaintiff in error, *vs.* Z. D. HARRISON *et al*, defendants in error.

A bill was filed by S., the complainant, against H. *et al.*, alleging that he purchased a city lot in Atlanta from Sasseen which was subject to a judgment held by Black against Sasseen; that he sold a part of the lot to Smith and executed to him a bond for title thereto; that part of the lot was sold by Smith to H., by a real estate agent, transferring complainant's bond to him; H. on learning that the lot was subject to Black's judgment against Sasseen, from whom the complainant purchased it, refused to pay the purchase-money to Smith; whereupon, Black executed a release to the complainant, releasing that portion of the lot purchased by H. from the lien of his judgment, but expressly stipulated therein that the release should not extend to the remaining portion of the lot, which the complainant alleges was done without his knowledge; the complainant executed a deed to H. for that portion of the lot purchased by him from Smith, H. paying the complainant what Smith had promised to pay him for that part of the lot. Afterwards, Black had his execution levied on the remaining portion of the lot as the property of Sasseen, which was sold by the sheriff, without notice to the complainant (there being no one in possession of that portion of the lot,) which was purchased by Hayden *et al.*, and subsequently sold to Harrison, who afterwards sold the whole lot to Withers. The prayer of the bill is that the sheriff's sale of that part of the lot sold in satisfaction of Black's judgment may be set aside as being void, the defendants be restrained from removing the improvements thereon, and that the same may be declared to be the property of complainant, and turned over to him. There is no allegation in complainant's bill that the defendant's are insolvent:

Held, That, if the complainant is entitled to any relief under the statement of facts contained in the record, he has an ample and adequate remedy in a Court of law as in a Court of equity, and that there was no

error in the Court below in sustaining the demurrer to the complainant's bill, and dismissing the same for want of equity.

Equity. Release of Lien of Judgment. Before Judge LOCHRANE. Fulton Superior Court. October Term, 1870.

Seago bought certain land from Sasseen, on the 8th of August, 1868, sold part of it to one Smith for $1,505 00 on credit, giving Smith his bond for titles. On the 7th of April, 1869, Smith agreed to sell his part of the land to Harrison for $1,600 00. Adair, a real estate dealer, negotiated this trade between Seago and Smith and Smith and Harrison. Harrison informed Adair that he wished a deed directly from Seago, whom Smith had not paid for the land; Seago agreed to make the deed, provided the consideration expressed in it should be what Smith had agreed to pay him, and to this Harrison assented. The deed was so made and left with Adair for delivery. (It is not stated in the bill, but it *seems* that Seago was to get his money out of the price which Harrison was to pay Smith and that Seago did so get it.)

Harrison discovered that the whole of the land was subject to a judgment against Sasseen, for about $800 00, which was controlled by Lawson Black, and notified Adair that he would not accept the deed or pay the $1600 00, unless the part which Seago had conveyed was released from said judgment. Adair asked Black, as a favor to Smith, to release that part of the land, saying that the part still owned by Seago was ample to discharge the judgment. Black said he would do so. Adair prepared a release which Black signed. It did not suit Harrison; he prepared another and told Adair to pay Black $5 00 for him, Harrison, and get him to sign that one. Black refused to sign that one, wrote one to his own liking, took the $5 00; Harrison accepted this release from Adair, paid him the $1,600 00 and took Seago's deed from him. The exhibited release states that the $5 00 was paid by Seago and expressly stated that it was agreed that the part of the land still owned by Seago should remain

subject to this judgment. It was dated the 2d of April, 1869. The date of Seago's deed to Harrison does not appear. It is avered that "at the time of signing" that deed Seago knew nothing of said release, and "is not privy" to the arrangement for procuring it.

The part of the land still held by Seago was vacant. In 1870, Black had his *fi. fa.* levied on that part; it was sold by the sheriff to three persons; they subsequently sold it to Harrison, he built a house upon it and subsequently sold the two parts to Withers for $4,250 00, and Withers is now in possession of the whole tract. Seago knew nothing of this sheriff's sale till after Harrison had improved the lot as aforesaid.

As Black's judgment called for but $800 00, and as Black released $1,600 00 worth of the land from said judgment, under the circumstances as aforesaid, Seago claimed that the judgment was, in law, paid and that therefore the sheriff's sale was void and, of consequence the subsequent conveyances were also void, and he prayed that the Court would so decree.

To this bill Harrison, Black & Withers, the defendants, demurred, upon the ground that the bill contained no equity, and that if Seago was entitled to any relief, his remedy at law was complete. The demurrer was sustained and the bill was dismissed. That is assigned as error.

THRASHER & THRASHER, for plaintiff in error.

W. T. NEWMAN; R. H. CLARK, for defendants, said sec. 3608 of the Code applied to *purchasers after* the release, and not to Seago. A release will not be extended beyond the intention of the parties: 5th G. and J. Want of notice of sheriff's sale does not affect *bona fide* purchaser: 37th Ga. R., 255; 11th, 423. Seago's remedy, if any, is against Black for purchase-money: 24th, Ga. R., 40.

WARNER, J.

The demurrer to the complainant's bill was properly sustained by the Court below. If the complainant is entitled to any relief on the statement of facts disclosed by the record, he has as ample and adequate remedy in a Court of law as in a Court of equity.

Let the judgment of the Court below be affirmed.

WILLIAM R. PHILLIPS, plaintiff in error, *vs.* WILLIAM SOLOMON, defendant in error.

Section 2121 of the Revised Code, of this State, providing that "the obligation of the surety is accessory to that of his principal, and if the latter, from any cause, becomes extinct, the former ceases, of course" is an affirmance only of the common law, and by the words "from any cause" is meant any cause dependent on the act or negligence of the creditor, and not such a cause as the discharge of the principal under the bankrupt law, which is beyond the control of the creditor, and by force of the laws of the land.

Bankruptcy. Surety. *Lex Loci Contractus.* Before Judge HOPKINS. Fulton Superior Court. October Term, 1871.

On the 22d of May, 1822, at Atlanta, Georgia, J. J. Morrison gave to Phillips his promissory note, due six months thereafter, with said Solomon as his security thereon. Upon this note Phillips sued Morrison as Maker, and Solomon as security. Morrison pleaded that on the 21st of January, 1869, he was "legally released" from said contract by a discharge in bankruptcy granted to him by the District Court of the United States, for the Northern District of Georgia. Solomon pleaded among other things "that he entered into said contract on the 22d of May, 1866, in said State, solely as a security for said maker," that said maker on the 30th of May, 1868, filed his petition in said United States District

Court for a release from all debts, claims, liabilities and demands which could be proved against his estate in bankruptcy, under the Act of Congress of the United States, etc., approved the 2d of March, 1867, and was, on the 21st of January, 1869, legally released from the same by said Court, as appears by his discharge (fully set forth); that said note was at the date of said application and discharge, and is yet, a debt which by said Act was provable against said Morrison's estate, and which existed on the 30th of May, 1868, and is not nor ever was such a debt as is by said Act excepted from the operation of a discharge in bankruptcy; that by that means said Morrison has been discharged from all liability on said note to said Phillips, and said Morrison's obligation on said note on the said day of said discharge became extinct. And by these means, according to the laws of Georgia, under which said contract was made, the said Solomon's obligation, which was only accessory to that of Morrison, became also extinct.

The note was read in evidence by plaintiff. The discharge as pleaded was admitted. Phillips' counsel demurred to said plea of Solomon, and the demurrer was overruled. Thereupon, no other evidence being introduced, the Court charged the jury that if the obligation of the principal had become extinct by his discharge in bankruptcy, the surety was discharged, and they should render a verdict for the defendants. This was done. Phillips' counsel say the Court erred in overruling said demurrer and in said charge to the jury.

HAMMOND, MYNATT & WELBORN, for plaintiff in error. Discharge of principal by bankruptcy does not discharge surety: 1st Par. on Con., 29; 1st Par. on B. & N., 249; Hilliard on Bankruptcy 307, and cases cited: 6th Ga. R., 257; section 4 Bankrupt Act 1941, section 34 Bankrupt Act 1800; 1st Atkins, 84; 2 Cowp., 525; 7 Bing., 508: Obligation of surety at common law same as by section 2121 R. Code: Ch. on Con., 435; 24th Ga. R., 296; 17th, 536. "Any

cause" means causes stated in next chapter of Code, *i. e.* novation, etc.: Burge on surety, 40. The Bankrupt Act of 1867 says surety is not discharged by discharge of principal, and section 2121 will not be construed to defeat payee's right: Burge on Surety, 293; Smith S. and Con. L., 631, section 486; Ibid, 6873, section 542.

A. W. Hammond & Son for defendant. *Lex loci contractus* fixes the rights of the parties: Cooley's Con. L., 285; 68 E. C. L. R., 832; 79th, 652; 82d, 910. Story on Conf. of L., 410; 416 R. Code, section 8, and the whole doctrine as passed upon by the Supreme Court of the United States as quoted by this Court in 37th Ga. R., 151, 173; 6th, 439, 440; 38th, 383–4; 39th, 428, 457–8. The Bankrupt Act of 1867 did not change the old law, except in allowing a creditor to *procure* the discharge of principal, and yet hold others bound. The old law is stated in the authorities cited by the opposite side. But sections 2120, 2121, changed the law of suretyship. Congress said the discharge in bankruptcy should not "discharge or release" others in old Acts. In Act of 1867 it added "affect." Parties may contract to be governed by local law without regard to the bankrupt law: Parsons on C., 29, 285; 10th E. C. L., 104. The Bankrupt Act never was intended to be uniform in its *effects*. Examine provisions as to lien, exemption, etc. *It* does not discharge Solomon, but his *contract*, under *lex loci*, does.

McCay, J.

It is admitted that by the express terms of the Bankrupt Law of 1866, section 34, the discharge of the principal in an ordinary contract of suretyship does not discharge the surety.

The point really made in this case is, that the Act of Congress only applies to the contract of suretyship in the general sense of the word surety, as it is understood in the commercial world, and does not cover a case of suretyship of a

special character, as, for instance, one in which it is expressly stipulated that the surety shall *not* be bound if the principal becomes a certificated bankrupt.

We are inclined to think this is a true view of the law; that it was not the intent of Congress to do anything more than to declare that the *Act* should not be *construed* so as to discharge sureties, and that this was done not so much to fix the law of the case, as by way of caution to prevent the Act from being construed to have an effect that, by its terms, it would not have. In other words, the *contract* of a surety, as it is understood in the commercial world, is always conditioned that the surety shall *not* be discharged by the bankruptcy of the principal: 1 Parsons on Con., 29; 1 Parsons on Bills, 249; Hilliard on Bankruptcy, 307; Ward vs. Johnson, 13 Mass., 152; 1 Atkins, 84; 2 Cowper, 525; 7 Bing., 508.

And section 33 and 34 of the Bankrupt Law of 1866, and the provisions of the Bankrupt Laws of 1841, and of 1800, are only in furtherance of and declaratory of what would have been true, had these sections not been put in the Acts. In my judgment, if such a contract of suretyship should exist, as was conditioned that the surety *should* be discharged, if the principal should be certified by a Bankruptcy Court, then this provision of the Act of Congress would not apply to the case; the surety would be entitled to the *terms of his contract.* His contract would be peculiar, and such a one as was not in contemplation of Congress in its passage of the Act. It is contended that this is just the nature of every contract of suretyship in this State; that section 2121 of the Revised Code declares the contract of the surety extinct, if, *from any cause*, the contract of the principal is extinct. It is argued that, as this was the law at the date of this contract, it entered into the stipulations of the parties and became a part of the contract. But is this a fair construction of our Code?

It must be remembered, that the object of the codification was not to *make* laws, but to *codify* or *declare* those already

in existence: Act of 9th December, 1858. It is true, that in some instances the Code has *changed* the law, though these changes are less frequent than is supposed. But, in the main, it cannot be doubted that the Code is to be looked at as what it purports to be, a codification of our laws, as they existed at the time, and its provisions are not to be considered as changing the law, unless the intent to change be clear.

Especially is this true of the definitions of the Code. Generally these definitions are very exact, but it would be beyond the scope of the codification to undertake to give *every* qualification or exception which the wide field of the common law makes to the meaning of words or phrases, and the codifiers have not attempted it. The Constitution of 1865 adopts the Code and "such parts of the Common and Statute Law of England and of the Statute Law of Georgia of force in 1860, as is not expressly superseded by, nor is inconsistent with the Code:" Con. 1865, Art. 5, Sec. 5. The Constitution of 1868, Article 9, Section 3, adopts it in pretty much the same language—using after the figures 1860, these words: "As are not superseded by said Code, though not embodied therein."

The language used in section 2120 is almost exactly the language of the English text-books, in defining the obligation of a surety: Chitty on Contracts, 435; Pitman on Principal and Surety, 157.

But in other parts of these treatises, these general words are qualified by this general principle, that the discharge of the principal, which discharges a surety, must be a discharge by some act or neglect of the creditor, and a discharge by *operation* of law being, as it is, against the consent and beyond the power of the creditor, does not discharge the surety.

Mr. Theobold, in his treatise, adds the qualification immediately after the general definition, thus: "The obligation of the surety also, in general, becomes extinct by the extinction

the obligation of the principal debtor." He then adds: An exception to this rule takes place whenever the extinction of the obligation of the principal arises from causes such bankruptcy and certificate, which originate with the law, d not in the voluntary acts of the creditor:" Theobold on incipal and Surety, sec. 114. See, also, Brown vs. Carr, 7 ng., 508; Langdale vs. Parry, 2 Daniel and Ry., 337. So, , section 2126 of the Code, and the whole of Article II., the chapter devoted to principal and surety put the reuse of the surety upon the acts or neglect of the debtor.

We conclude, therefore, that the Codifiers, in their definion of the contract of suretyship in section 2121, when they ed the words "from any cause," merely followed the genal language of the books, and did not intend, in those ords, to include a cause in which the law was the mover, d over which the creditor had no control, and which his ts had nothing to do with. To suppose that they intended herwise, would be to assume they intended to *change* the w, and to change it, too, in a particular contrary to the neral law of the commercial world, including that common w they were codifying. At the date of this codification, ere was no Bankrupt Law of the United States, and no obability of one, and it would be imposing a duty of preience on the codifiers to require of them, in their *general finitions*, to use language so precise as to cover not only the ses happening day by day around them, but such as might ppen in any event.

Judgment reversed.

Buchanon *vs.* Higginbotham.

A. J. Buchanon, plaintiff in error, *vs.* W. B. Higginbotham, defendant in error.

An action was brought by the plaintiff against the defendants, the one as tenant in possession, the other as the true claimant, to recover the possession of a lot in the city of Rome, which had been sold by the sheriff under an execution against the plaintiff, and purchased by S., alleging that the sheriff's sale of the lot to S. was fraudulent and void. On the trial the plaintiff proved, by his own evidence, that S. had sold the lot to M. for the sum of $1.350 00, and it also appears from the record that M. had sold the lot to H., one of the defendants, but for what amount, is not shown, nor are the deeds of conveyance set forth in the record. The jury found a verdict for the plaintiff. The defendants made a motion for a new trial on several grounds, one of which was that the Court erred in refusing to charge the jury, as requested by defendant's counsel, "that if they believed that S. obtained possession by a fraudulent purchase, yet, if the property was sold by him to M., and by M. to H., the defendant, then H.'s title will be protected, and the plaintiff is not entitled to recover, unless the evidence shows notice of the fraud in him." The Court granted a new trial in the case, and the plaintiff excepted:

Held, That in view of all the facts contained in the record, this Court will not control the discretion of the Court below in granting the new trial.

New Trial. Notice. Before Judge Kirby. Floyd Superior Court. July Term, 1870.

Buchanon brought ejectment against Higginbotham. As Higginbotham claimed under Buchanon his possession at the commencement of the suit the 22d June, 1868, and the value for rent were shown, and plaintiff closed. Defendant then read in evidence a *fi. fa.* in favor of Terrass Brothers, against Buchanon and John H. Lumpkin, issued on the 8th of September, 1862, on a judgment obtained the 30th of July, 1662, for $125 56 principal, $14 21 interest, and $11 80 costs, on which was a levy on said lot, "as the property of defendant, he being a non-resident." This levy was made on the 22d of May, 1863, and under it, on the 6th of July, 1863, the sheriff sold the land to C. H. Smith for $1000 00. There was applied to the payment of various executions

against Buchanon, in the sheriff's hands, all of said money but $135 22. All this appears *in extenso* on the *fi. fa.*

The defendant next offered in evidence, the deed from the sheriff to Smith in the usual form, except that the *fi. fa.* is therein described as being against Buchanon, without mention of Lumpkin's name. Because of this variance, plaintiff's counsel objected to said deed as evidence, but the objection was overruled, and the deed was read to the jury. Defendant's counsel then read in evidence a paper signed by Smith, in which it was stated that all claims by Smith against Buchanon were released, and all by Buchanon against Smith or Smith and Underwood were adjusted, and that the balance due Buchanon on account of the sale of his property, was in Confederate currency, and of little value. It was dated the 23d of July, 1867. Smith testified that after the war, he had a settlement with Buchanon, but hearing of his complaining, again settled with him touching all their individual business, and the business of his firm, Underwood & Smith; and this settlement was understood by both to cover the land matter, and he heard no complaint till just before this suit was brought; that at this last settlement he cancelled about $300 00 or $400 00 due from Buchanon to clients of Underwood & Smith, in judgment, and that since, he paid for Buchanan $20 00 and certain freights, which Buchanon still owed him. He further said the property was hanging at the sheriff's sale at $800 00, when he bid the $1,000 00, and it was knocked off to him; that the debts paid off as aforesaid by the $1,000 00 were *ante bellum* debts, contracted by Buchanon on a specie basis; that in 1863 he sold the land to Marshall, and Marshall sold it to defendant.

The sheriff testified that the said deed was made by him, in pursuance of said sale under said *fi. fa.*, was prepared by Smith, and that he supposed the name of Lumpkin was omitted by oversight; that the property was pointed out by Underwood & Smith, attorneys for plaintiff in *fi. fa.*, the sale was legal and fair, and the entries on said *fi. fa.* were true.

In rebuttal, Buchanon testified, that in May, 1862, he was residing in Rome, Ga., was mustered into the Confederate service, went to South Carolina, and thence to different places, and did not return to Rome till after the war.

But he said he had no intention of remaining away from Rome, and only took his family to Carolina in 1862 because his wife's parents resided there. He and his family came back to Rome in 1867. He said he was in the Confederate States army when the sheriff's sale occurred; that he heard of it, and received a letter from Smith which made him suppose it was all right, and that his settlement with Smith covered nothing touching the land matter, except the balance of the $1,000 00, which was left after the appropriation to other *fi. fas.* by the sheriff, as aforesaid. Plaintiff also read in evidence a letter from Smith to Buchanon, dated August 21st, 1863. In it, Smith wrote recounting that he had tried to buy said land from Buchanon at $1,000 00, which he had written he would take for it, but upon the offer by Smith to pay the $1,000 00 in Confederate currency, Buchanon had demanded bank notes, and prevented the trade; that Smith supposed he was residing in South Carolina, and was not in the army, and as the stay-law was confined to citizens of this State, and Underwood and Smith held about $500 00 of judgments against him, he had had the land levied on and sold. In it, he recounted the circumstances of the sale and distribution of the proceeds as aforesaid, and stated that the sale was legal in every respect, and asked what to do with the balance of the money. Plaintiff also read in evidence Barber & Son's table of the comparative value of specie and Confederate currency during the war. The jury found for the plaintiff. Defendant moved for a new trial upon the following grounds:

1st. Because the Court erred in charging the jury as follows: "If you believe that C. H. Smith had the land levied upon with the *fi. fas.* which he had in his control, as attorney for his clients, with a view to defraud the plaintiff in

this action, and for the purpose of speculation, then the plaintiff is entitled to recover."

2d. "Because the Court refused to charge the jury as requested by counsel for defendant, in writing: "That if the jury should believe that C. H. Smith obtained possession by a fraudulent purchase, yet, if the property had been sold by him to Marshall, and by Marshall to Higginbotham, the defendant, then Higginbotham's title will be protected, and the plaintiff is not entitled to recover, unless the evidence shows notice of the fraud in defendant."

3d. Because the Court omitted to give the following charges to the jury when requested so to do, in writing, by counsel for defendant, to-wit: Numbers one to five, inclusive. 1st. "If the jury believe that Buchanon was a non-resident, or not an inhabitant of this State at the time the levy and sale were made, then the sale was valid and binding, even if the Stay-laws are constitutional. If the sheriff sold the land and set forth in the levy that Buchanon was a non-resident, and the other proceedings, in reference to the levy and sale, were regular and legal, then the purchaser got a good title, and the remedy of Buchanon, if any, is against the sheriff for trespass. 2d. If the jury believe that the money arising from the sale was, in part, applied to Buchanon's debts, and that he made a settlement with C. H. Smith for the balance coming to him, and held up in the sheriff's hands, and received money or claims against him in satisfaction of said balance, then such settlement is an approval of the application of the funds, and ratified such application. And if said settlement was intended by the parties to apply to the claim of Buchanon for the property itself, he is bound by it and cannot recover. 3d. The Act of December, 1861, which forbids the levy and sale of the property of soldiers in the Confederate service during their absence, is null and void, the same being against public policy, and being also void under the Constitution of this State, which declares that all Acts passed by the Legislature of this State in aid of the re-

bellion are null and void; and Buchanon cannot recover under this Act. 4th. The Stay-laws of this State, passed in 1866, and prior thereto are unconstitutional and void, and for this reason the sheriff had a right to levy on and sell the property of defendant at any time prior to 1866, and if the levy and sale are otherwise regular, the purchaser at the sale got a good title and will be protected. "The Supreme Court of this State having ruled that the Stay-law was unconstitutional and void, under that ruling the plaintiffs in *fi. fa.*, Terrass Brothers, were never under any legal disability to enforce the collection of the money due on their *fi. fa.*" The Supreme Court has held the Stay-laws passed in 1866, and prior thereto, unconstitutional and void, and that it was the right of plaintiffs in *fi. fa.* to proceed and make their money by levy and sale during the period when it was expressly forbidden by the Stay-laws, "and therefore, if the levy and sale were made during this period, it was lawful and the purchaser will be protected." 5th. If Buchanon absented himself from this State for an illegal purpose, such as to aid in the rebellion, and the levy and sale was otherwise regular and legal, he cannot recover, because his absence was voluntary, contrary to public policy, and illegal." And in lieu thereof, the Court gave, as he stated, the substance of these charges—when he stated to the jury that all the laws passed by the Legislature from 1860 and since, embracing what are known as stays, suspension and relief, had been decided by the Supreme Court to be unconstitutional, and that, if these decisions were reversed, the Supreme Court must do it, he would not overrule them, but be governed by them until reversed.

4th. Because the jury found contrary to the charge of the Court, when the Court instructed them, that if C. H. Smith and Buchanon, the plaintiff, got together in 1867, and settled the matter in dispute, Smith paying Buchanon a consideration therefor, that was an end of the matter, and plaintiff could not recover.

5th. Because the jury found contrary to the law and the evidence.

The Court granted a new trial. It is said that this was error, because the Court erred in charging the jury that the Act of the 14th of December, 1861, and all the Stay Laws, including that of November 29th, 1862, were unconstitutional, and in charging that the decision of the Supreme Court covered the Acts of December 14th, 1861, and November 29th, 1862; because he should have ruled out said *fi. fa.*, and because he granted said new trial.

WRIGHT & FEATHERSTON, for plaintiff in error.

ALEXANDER & WRIGHT, for defendant in error.

WARNER, J.

On the statement of facts disclosed by the record in this case, this Court will not control the discretion of the Court below in granting the new trial.

Let the judgment of the Court below be affirmed.

LEMUEL GARNER, plaintiff in error *vs.* THE STATE OF GEORGIA, defendant in error.

A defendant was indicted for the offense of riot, and on being arraigned, plead "not guilty," and was put upon his trial before the jury, and after the evidence was closed on both sides, the defendant withdrew his plea of "not guilty" and plead "guilty," which latter plea was entered on the minutes of the Court. After the jury were discharged from further consideration of the case, the defendant withdrew his plea of "guilty" and so notified the presiding Judge, in October, 1867. But the records of the Court do not show anything as to such withdrawal of the plea of guilty. No judgment was passed on the defendant at that time. In October, 1870, the defendant was called on to show cause why judgment should not be passed upon him for the offense, on his plea of guilty as it appeared on the records of the

Court. The defendant showed for cause, the above recited facts, which did not appear on the records of the Court, and the Court passed judgment on the defendant in accordance with the facts as the same appeared on the records of the Court, to which the defendant excepted:

Held, That the proceedings of a Court are known by its records, and if the facts insisted on by the defendant for arresting the judgment did not appear on the records of the Court, the legal presumption is, that they did not exist, especially after the lapse of three years.

Criminal Law. Arrest of Judgment. Before Judge PARROTT. Murray Superior Court. October Term, 1870.

All that appears by the record of this case is as follows: At October Term, 1867, Judge Milner, then presiding, issued an order, reciting that at the then last term of the Court Garner was put upon trial for riot, and, after all the evidence for the prosecutoin had been introduced, withdrew his plea of not guilty and pleaded guilty; and an order requiring him to show cause why he should not then be sentenced for said crime. At October Term, 1870, before any sentence was passed upon him, his counsel withdrew said plea of guilty and pleaded not guilty. At this last term his counsel moved in arrest of judgment, upon the ground that the withdrawal of the plea of guilty and the plea of not guilty were a bar to further proceedings against Garner until trial and conviction. In this motion it is said that said withdrawal "was recognized and allowed by the then presiding Judge." Judge Parrott overruled this motion in arrest of judgment at October Term, 1870, and sentenced Garner. The bill of exceptions recites that said withdrawal was before the Court adjourned, but after the jury was discharged from the consideration of the case; that the Judge was notified of said withdrawal, "and hence said Judge, in October, 1867, did not pronounce any sentence or pass any judgment against said defendant." This refusal to arrest the judgment is assigned as error.

J. A. W. JOHNSON, J. A. R. HANKS, for plaintiff in error.

Davis *vs.* McDonald.

C. E. BROYLES, Solicitor General, by D. A. WALKER, and R. J. MCCAMY, for the State.

WARNER, J.

There was no error in the Court below, in refusing the motion in arrest of judgment, on the statement of facts disclosed by the record. The proceedings of a Court are only known by its records, and if the facts insisted on by the defendant for arresting the judgment did not appear on the records of the Court, the legal presumption is that they did not exist, especially after the lapse of three years.

Let the judgment of the Court below be affirmed.

SARAH O. DAVIS, plaintiff in error, *vs.* J. D. W. MCDONALD, defendant in error.

The widow's right to dower in the lands of which her husband died seized and possessed either by deed, or in law, is a legal right of which she cannot be barred except in the manner as provided by law, that is to say, her relinquishment of her right to dower must be made in the manner as prescribed by law.

Dower. Before Judge PARROTT. Murray Superior Court. October Term, 1870.

This was an application for dower by Sarah O. Davis against James McDonald, claiming the land. The parties agreed to have the matter decided by the Judge, upon the following admitted facts: Chilion Pacard died about 1852, seized and possessed of the lands out of which the applicant claims dower, leaving the applicant, his daughter, his sole heir-at-law, she having previously married Alfred J. Davis, and she and her husband were living with her father at the time of his death; said Davis and wife lived on said lands until February, 1861, when said Davis contracted said lands

to defendant, taking his notes and giving his bond for titles on the payment of said notes. This bond was in the body of it in the names of said Davis and wife, but was signed by Alfred J. alone. Said trade was made with the consent and approbation of the applicant, and she, before the trade was closed, and in the absence of her husband promised to sign the bond, and the reason she did not do so at the time was, that Martin Teat had attested her husband's signature, and he was absent then, and she would sign in his presence, when she could see him to attest her signature, and the matter was neglected. To different persons, in the absence of her husband, she expressed her satisfaction at and approved of the trade, and freely consented for defendant to move into possession of the lands, and she and her husband moved to another place because she did not like this place. She saw McDonald pay her husband part of the money and her husband handed her his pocket-book with the money, to put away for safe keeping. McDonald has paid all the purchase-money for the lands except $1,200 00 or $1,400 00 on the last note, which Alfred P. Davis sold to Francis Wright and indorsed, and having moved away to Alabama he was not sued, but judgment has been obtained against McDonald for said balance. Alfred Davis died a year ago and the applicant is his widow, the note sued on by Mrs. Frances Wright was dated February, 1861, and due 25th of December, 1862, and was indorsed in September, 1863, and applicant had been wanting to sell the place for years and so expressed it in his absence repeatedly.

The Court decided that Mrs. Davis was not dowable in said land, under said facts, and that is assigned as error.

D. A. WALKER, for plaintiff in error.

JOHNSON & MCCAMY, for defendant.

WARNER, J.

The Court below erred in deciding that the widow was barred of her right to dower in the lands of her deceased husband, on the statement of facts disclosed in the record of this case. To bar the widow's legal right to dower her relinquishment of that right must be made in the manner prescribed by law.

Let the judgment of the Court below be reversed.

JACOB STEEL, plaintiff in error, *vs.* LARKIN PAYNE, defendant in error.

A contract was made between the plaintiff and defendant, for the rent of a tract of land, to repair and build certain houses and stables thereon. Defendant was to repair and rebuild the fence, plaintiff to keep it and work it for two years and pay defendant one-third of the crops for rent. The contract was not reduced to writing at the time, but defendant promised to have it done at some future time, but neglected to do it, The plaintiff went on the land under the contract, cleared up one field, the work of which was worth $100 00, built and repaired houses, the work of which was worth $50 00, cultivated the land one year and paid the rent. Defendant would not consent for plaintiff to remain on the land another year, but rented the land to other persons and put them in possession of it. Plaintiff cleared up the land and did extra work on it, in order to get to stay on it two years. Defendant moved to dismiss plaintiff's case, on the ground that plaintiff sought to recover damages for the breach of a void parol contract, for the lease of land for more than one year, which motion was sustained by the Court, and the plaintiff excepted:

Held, **That there was such a part performance of the contract, on the part of the plaintiff as would take the case out of the provisions of the fifth paragraph of the 1940th section of the Code, and that it was error to dismiss the plaintiff's action on the statement of facts contained in the record.**

Statute of Frauds. Part Performance. Before Judge **PARROTT.** Dade Superior Court. November Term, 1870.

Steel *vs.* Payne.

Steel sued Payne for damages for breach of a verbal contract as to the rent of certain lands for two years, averring various facts of part performance. These facts and the contract sufficiently appear by the evidence. On the trial, plaintiff testified, substantially, as follows:

Defendant's land was grown up in brush and briers when he rented it. By the contract, defendant was to repair and rebuild the fence, plaintiff to keep and work the land for two years and pay defendant one-third of the crops for rent. The contract was not reduced to writing at the time, but defendant promised to have it done at some future time, but neglected to do it. The plaintiff went on the land under the contract, cleared up one field, the work of which was worth $100 00, built and repaired houses, the work of which was worth $50 00, cultivated the land one year and paid the rent. Defendant would not consent for plaintiff to remain on the land another year, but rented the land to other persons and put them in possession of it. Plaintiff cleared up the land and did the extra work on it, in order to get to stay on it two years. Defendant used no force or legal process to put plaintiff out of possession, and plaintiff used neither to prevent the new tenant from taking the possession.

Another witness was offered to proved the same facts. Defendant's counsel objected, and moved to dismiss the action, upon the ground that the case made by the pleadings and evidence was that of a contract void by the Statute of Frauds. The Court rejected the evidence and dismissed the cause. That is assigned as error.

E. D. GRAHAM, for plaintiff in error.

R. H. TATUM, by J. A. W. JOHNSON, for defendant.

WARNER, J.

There was such a part performance of the contract on the part of the plaintiff, on the statement of facts contained in

the record as would take the case out of the provisions of the 5th paragraph of the 1940th section of the Code, and it was error in the Court below to dismiss the plaintiff's action.

Let the judgment of the Court below be reversed.

W. H. BRANTLEY, plaintiff in error *vs.* MARY CHEELEY *et al.*, defendants in error.

A bill was filed for direction and to marshal the assets of a deceased intestate's estate, and the question as to priority of payment was made between a mortgage creditor of the intestate and the legatees of a testator, on the following statement of facts: Dickson, Davis and Mary Cheeley were the executors and executrix of John Cheeley, deceased; in December, 1860, the executors sold at public outcry a tract of land as the property of their testator, the terms of the sale being a credit of twelve months, with notes and approved security; the land of said Executors' sale was bid off by Dickson, one of the executors, for the sum of $9,041 00, who gave his individual note to Davis, one of the executors, for the amount, and went into immediate possession of the land, and remained in possession of it up to the time of his death, controlling and using it as his own property. Dickson gave no securily on the note, and refused to give any. The land was worth, at the time of the sale, in the market, what Dickson bid for it. Afterwards, Mrs. Cheeley, one of the executors, (Davis being dead,) instituted a suit in equity against Dickson on the note given by him for the land, and claimed a vendor's lien for the purchase-money due therefor by Dickson, obtained judgment for what was then due on the note, and established the vendor's lien on the land for unpaid purchase-money due therefor by Dickson. After Dickson's death the land was sold, under that judgment, establishing the vendor's lien, and the proceeds of that sale were paid over to the legatees of John Cheeley. The land was sold under that judgment for what it was worth in the market at the time, but lacked paying off the judgment the sum of $2,484 00. The Court decided that this latter sum was a debt due by Dickson, as *executor* of John Cheeley, and entitled to priority of payment out of his assets:

Held, That the purchase of the land by Dickson, at executor's sale, was not void, but voidable, at the election of the legatees; that they might have treated that sale as a *devastavit* on the part of the execu-

tor, or ratify it, at their option, but having acquiesced in that purchase for a considerable length of time, and treated the debt due by him therefor as his *indiridual* debt, and having received the larger portion of the judgment in payment for their claim for the land founded on that individual debt due by him for the land, they cannot now be heard to say that the balance due on the judgment is a debt due by him as executor, after receiving the larger amount of the judgment obtained against him for the land as a debt due by him in his individual capacity; they could either have repudiated the sale of the land at the executor's sale, and treated it as a *devastavit*, or ratified and confirmed it, but they cannot ratify the sale of the land in part, and repudiate it in part; in other words, they cannot reserve a part of the money for the land as due by Dickson in his individual capacity, and as his individual debt as a purchaser of the land at the executor's sale, and claim that the balance of that same debt is due by him as executor for a *devastavit* in purchasing the land at his own sale, as set forth in the record. If the land had sold for more money under the judgment sale as the individual property of Dickson than he paid for it at the executor's sale, then the legatees would have had the benefit of it, but as the land sold for less, they cannot now, after the land has been sold in the due course of administration, under the vendor's lien, asserted by the surviving executor, who represented the interest of the legatees of Cheeley's estate; and with a full knowledge of the facts on their part, having acquiesced in the same, and received the proceeds of the land, they must now be held to have affirmed the purchase of Dickson at the executor's sale, and that his debt for the land, was his individual debt, and not a debt due by him as an executor for a *devastavit* in purchasing the land at his own sale.

Executors. Priority of Liens. Before Judge ANDREWS. Hancock Superior Court. April, 1870.

John Cheeley died testate, leaving certain land to his legatees: His nominated executors were Thomas J. Dickson, George W. Davis and Mary Cheeley, all of whom qualified. In 1860, they, as such executors, offered for sale said land to the highest bidder, upon a credit, the purchaser to give security. Dickson bid off the land, gave his note for the purchase-money, without security, to his co-executors, took immediate possession of the land and controlled it as his own till his death. The price bid for said land by Dickson was not more than its value in the market at that time.

Davis died. Mary Cheeley, as executrix, sued Dickson on said note, had a decree for its amount, and for a vendor's lien on said land in October, 1867. Dickson died. Afterwards this land was levied on under said judgment, and was sold by the sheriff in January, 1869. It brought all it was then worth in the market, and the proceeds were applied to said judgment, leaving a balance still due on the judgment. Mary Cheeley, as executrix, divided this fund and certain money which Dickson had paid before judgment, between herself and the other legatees of John Cheeley. The legatees never received anything else on account of said land. Dickson owed Brantley, and gave him a mortgage to secure the debt. After Dicksons death his administrator found his estate to be insolvent and filed a bill for marshaling assets, etc. One of the questions presented for direction grew out of the facts herein stated which appeared from the pleadings and proof on the trial. There was a fund on hand for distribution, and Brantley and the legatees of John Cheeley were contending for it.

The legatees admitted that Brantley's debt should be paid in preference to their claim, if their claim was against Dickson, as a private individual. But they contended that, under the facts aforesaid, their demand was against Dickson, as executor of John Cheeley, and, therefore, had priority over Brantley's in the distribution of the assets. Brantley's counsel contended that their claim was not against Dickson, as executor, and that, if it were, the sale by Mary Cheeley, as executrix, and the acceptance and division of the proceeds of said sale among the legatees, as aforesaid, estopped them all from setting up their pretended priority. The Chancellor held that all the legatees of John Cheeley were entitled to such priority, except Mary Cheeley. Brantley's counsel assign said decision as erroneous.

Toombs & DuBose, for plaintiff in error.

Hilton Stephens, for defendants.

WARNER, J.

From the statement of facts disclosed by the record in this case, the Court below erred in deciding that the balance of the debt due on the judgment establishing the vendor's lien on the land against Dickson, as the purchaser thereof, at the executor's sale, was a debt due by Dickson, as *the executor* of John Cheeley, and as such, entitled to *priority* of payment out of the assets of Dickson's estate.

Let the judgment of the Court below be reversed.

EARLY W. THRASHER, plaintiff in error, *vs.* ALBERT G. FOSTER, defendant in error.

Where, upon issue joined on a sheriff's answer between two contesting judgments, claiming money raised by the sale of the property of defendant, it appeared, upon the trial, that the judgment of Thrasher was dated 10th of September, 1868, and on the 12th of May, 1862, the *fi. fa.* issued therefrom had an entry by the sheriff of costs received from the plaintiff; and it also appeared, in 1867, he had petitioned the Court for an order granting an *alias fi. fa.*, which was granted, and with the proceedings in March, 1867, was placed upon the minutes of the Superior Court, and it further appeared at the time of the sale of the property, a transcript of the record of judgment in January, 1868, was placed in the sheriff's hands at the time of sale, and in March, subsequent thereto, the *fi. fa.* was placed in his hands, and upon the trial of such issue this judgment *fi. fa.*, with the entries thereon were rejected by the Court, on the ground that it was dormant, to which exception was then made, and the Court, after the rejection of the other *fi. fa.*, permitted the other contestant to take a verdict:

Held, That it was error in the Court to have permitted the verdict, under the facts in this case, as under his ruling rejecting the *fi. fa.*, there was no issue to try, and nothing which invoked the judgment of the jury, and that his judgment was, in effect, final, and came before this Court properly by appeal.

Held again, Under the facts in this case, and the former decisions of this Court, the Court erred in holding the judgment to be dormant, the entry by the sheriff, of costs received from the plaintiff, was sufficient

to keep the judgment from becoming dormant and the petition for the issuing of an *alias fi. fa.* and the proceedings therein had, was evidence of the intent of such plaintiff that his judgment was subsisting within the provision of law, and that the Court erred in holding the judgment to be dormant.

Dormancy of Judgments. Before Judge ROBINSON. Morgan Superior Court. September Term, 1870.

On the 10th of September, 1860, Thrasher obtained a judgment against Baldwin Copeland, and had a *fi. fa.* issued thereon. On the 12th of May, 1862, the sheriff receipted on the *fi. fa.* for the costs then paid by Thrasher. On the 15th of July, 1863, Thrasher receipted on the *fi. fa.* for part of the sums due thereon. The *fi. fa.* was lost, and on the 18th of March, 1867, an order was issued at Chambers for an *alias fi. fa.*, upon Thrasher's petition, and the *alias* issued. Subsequently Copeland's property was sold under a *fi. fa.* in favor of Foster, founded upon a judgment obtained in 1863, and the sheriff was ordered by Thrasher's attorney to pay the proceeds to Thrasher's judgment. He did not pay, and was ruled by Thrasher. He answered the facts and prayed direction from the Court. Foster became a party to this rule, and averred that Thrasher's judgment was dormant, or, if not, was paid, and on this he and Thrasher joined issue.

On the trial, Thrasher's counsel read in evidence the *alias fi. fa.* showing said entries and a copy of the proceedings for obtaining this *alias*. Foster moved to rule out this evidence, because from it, it was apparent that Thrasher's judgment was dormant, and the motion was sustained. The jury rendered a verdict finding that the fund in the sheriff's hands was subject to the payment of Foster's judgment, and not subject to Thrasher's. The ruling out of said evidence for said reason, and the allowance of said verdict, are assigned by Thrasher as error.

THRASHER & THRASHER, REESE & REESE, for plaintiff in error.

A. G. & F. C. FOSTER, J. A. BILLUPS, for defendant.

LOCHRANE, C. J.

This case came before the Court upon an issue formed on a rule *nisi* granted against the Sheriff of Newton county, claiming money raised by the sale of property belonging to one Baldwin Copeland. The defendant in error suggested fraud, payment of the execution and its dormancy, and upon a trial of the case it appeared that Thrasher's *fi. fa.* was issued on a judgment dated 10th September, 1860, and on the 12th day of May, 1862, thereafter, contained an entry of the receipt for costs from the plaintiff, Thrasher, by the sheriff. It also appeared that, in 1867, Thrasher petitioned the Court to grant an order for the issuance of an *alias fi. fa.*, which was granted. The order, with the proceedings, were directed to go of record on the minutes of the Court on the 18th day of March, 1867.

It was also shown that a notice, with a transcript of the record with the judgment, was given to the sheriff on the 7th of January, 1868, by plaintiff's attorney, and subsequently thereto, on the first Monday in March, 1868, the *alias fi. fa.* was placed in the sheriff's hands, which was done before the rule *nisi* was issued.

Among other objections made to the testimony and introduction of the *fi. fa.*, with entries thereon, by the attorneys of A. G. Foster, one was, that the *fi. fa.* was dormant, which objection the Court sustained, and ruled out said *fi. fa.*, which ruling was then and there objected to, and after which the Judge presiding permitted Foster to go to the jury and take a verdict, finding the money in the hands of the sheriff not subject to the *fi. fa.* of Thrasher which had just been ruled out, but that it was subject to the *fi. fa.* in favor of Foster. On this statement of facts and the exceptions recited, the case comes now before the Court.

In the view which we take of this case, and the legal pro-

positions it involves under the direction which, in the opinion of this Court, it is proper to give it, it will not be necessary to discuss some questions which have been raised and argued before us in relation to the discrepancy between the allegations in the petition for *alias fi. fa.* and the order granting the same, so far as relates to an entry of credit. Under the facts in this case we hold, after the Judge ruled out the *fi. fa.*, the predicate of the rule *nisi* against the sheriff, and upon whose answer to which issue had been joined between that *fi. fa.* and the one under which the property was sold, it was error in the Court to have permitted the verdict of the jury, as under his ruling there was no issue for the jury to try, and nothing which invoked their judgment, the ruling of the Court being in its nature a final disposition, and such a judgment as could properly by appeal come before this Court for its reviewing adjudication. Again, upon the facts in this case, we do not hold that this judgment was dormant.

Under the decision of this Court in *Battle vs. Shivers*, Judge McCay, in delivering that opinion, enters into an able and elaborate opinion upon this subject, which renders it unnecessary for us to reiterate the legal principles so ably discussed in an exhaustive disquisition on the common and statute law upon this subject. Quoting from that decision, we say the point of the Act that the plaintiff, once in seven years, at least, shall so use his judgment as that the proper officer has a return to make to the Court, the words are: "A return by the proper officer." Now, anything is a return which is a reply to the mandate of the Court—anything which the sheriff might lawfully return. The intent of the law is not repose; the plaintiff may keep his judgment in force by a simple direction to the sheriff, once in seven years, not to proceed with it; provided, that it is put by the sheriff in the shape of a return. Under the equitable construction given to this Act by our predecessors, and within the principles of the decision just recited, this Court held, at the present term, that the payment of costs, merely, by the defen-

dant to the sheriff, entered upon the execution was sufficient to keep the judgment from becoming dormant. We see no reason why the payment of costs by the plaintiff is not entitled to the same principle of construction, and does not possess the same efficacy and effect as the payment by the defendant, when it is properly entered as returned by the sheriff. In 25*th Georgia*, 275, this Court, LUMPKIN delivering the opinion, refers to 2*d Kelly*, 252, and referring to the dormant judgment Act, says: "This Court, when the dormant judgment Act first came before it for construction, following the lead of the Judges in convention, departed from the letter of the statute, and interpreted it by its reason and spirit." And as the case of *Booth vs. Williams*, Judge WARNER delivering the opinion, gave to this Act a liberal construction, using this language: "It is an ancient maxim of the law that he who sticks to the letter sticks to the bark, and gets the shell without the kernel—the form without the substance. *Qui heret in litera heret in cortice.*"

By the application of these general principles, we feel satisfied that, for the purposes for which the Act in question was enacted, such payment by the plaintiff of costs, and such entry by the sheriff was, in its substantial effect, and in the spirit of construction, as potential as the payment of costs by the defendant and such entry by the sheriff would have been, and comes within the principle decided by this Court, at this term, in the case of *Clark vs. Feagan.*

Again, we hold that the petition by the plaintiff in *fi. fa.* for the issuing of an *alias fi. fa.*, and the proceedings therein had, was evidence of the intent of such plaintiff, of his claim that his judgment was subsisting and sufficient notice of that fact, within the spirit of the law. In view of this proceeding in open Court. and speaking from its minutes, may we not say with Judge LUMPKIN, in the case of *Ector vs. Ector*: "Is not the publicity of this transaction quite equal to a return of *nulla bona*, or a receipt of $5 00 upon the writ of execution by the sheriff or constable? Does it not demon-

strate, in point of fact, that the creditor is actively endeavoring to collect his money?"

In *Wiley et al., vs. Kelsey et al.*, this Court held that if an execution is not barred at the time it comes into Court to claim money, the statute cannot subsequently attach, pending the litigation. We, therefore, hold under the former decisions of this Court and under the facts in this case, that the Court below erred in holding this judgment to be dormant and rejecting it upon this ground in the trial of the issue in the Court below.

Judgment reversed.

E. A. WALKER AND WIFE, plaintiffs in error, *vs.* LITTLEBERRY JACKSON, defendant in error.

Where the verdict of a jury in an equity case was directly contrary to the testimony of three witnesses, sworn on the trial, and directly contrary to the answer of the defendant in a matter responsive to the bill, but was strongly supported by the admissions the defendant made in writing, before suit was brought, and by his admissions under oath in giving in his taxes, for seven or eight years, and the Judge below granted a new trial:

Held, That whilst this Court is not exactly satisfied with the judgment of the Court below, yet, as the case is one of *granting* a new trial, so that the parties may have another hearing, we do not thing the discretion vested by law in the Judge of the Superior Court has been abused, and we will not therefore disturb his judgment.

New Trial. Before Judge ROBINSON. Green Superior Court. September Term, 1871.

Walker and wife brought a bill against Jackson for an account of certain money alleged to have been delivered to him, as her trustee, by his father and her grand-father. He denied being her trustee, except under the terms stated herein. That is, he said that his father from time to time divided part of his property between his children and grand-

children, but not liking Mrs. Walker's father, gave the part for her and her brother to him, Jackson, to be paid to them at their respective majorities, without interest, reserving to himself the full power to direct and control said fund, took Jackson's note for the advances, and subsequently revoked the power to pay to Mrs. Walker the part intended for her; that his father, still living, never parted with his dominion over said fund, but Jackson controlled it as his father's agent.

On the trial, complainant read two letters from Jackson to Mrs. Walker and her brother, in which he called himself their trustee, and stated how much money he held, as such, for each, and that it was given to him by his father. They put in evidence defendant's return for taxes from 1853 to 1864, inclusive, in each of which years he gave in for taxes a sum of money as due to each of them by him as trustee. They showed that he paid the brother his full amount during the war, and that he frequently spoke of himself as their trustee.

The defendant, and several witnesses who were present at said respective divisions of property, testified, that the old man, in each case, took the note of the party to whom he paid money for his grand-children, and expressly reserved the right of dominion over the amounts of cash or the property given. Defendant testified, that he did not pay the brother till his, defendant's, father gave his consent for him to do so, and put in evidence a paper dated 9th of April, 1867, reciting that he did make defendant trustee for said children, to control according to his directions, and that the war had rendered the money worthless, and ending thus: "I do release him from being trustee anylonger," and "order him not to pay any amount of money of our currency" to Mrs. Walker. This paper is signed by the father's mark; he was then eighty-nine years old. The Court charged the jury, and they found against Jackson, as trustee, for the amount shewn to have been received by him for Mrs. Walker, with interest.

Jackson moved for a new trial on the following grounds: 1st. Because the Court failed to tell the jury that if Jackson was liable, as trustee, he was entitled to commissions, as trustee. 2d. In failing to instruct them as to the effect of the evidence as to interest. 3d. Because the verdict was contrary to the charge of the Court, that if the old man at the time of depositing the fund in controversy with defendant, or afterwards, did not part with his control and dominion over it, defendant is not liable to complainants. 4th. Because the verdict is contrary to law and the evidence, and last because of the general charge being adverse to defendant.

The Court granted a new trial, without stating upon what ground. This grant of a new trial is assigned as error.

I. L. HARRIS. JAMES S. BROWN. REESE & REESE, for plaintiffs in error.

M. W. LEWIS, for defendant.

McCAY, J.

Without doubt the defendant in this suit presented a strong array of testimony in favor of his account of the true character of this deposit. His two brothers and the overseer of the father, as well as the incidental evidence of the father's revocation of the trust, and his own answer *in direct response to the charges* of the bill, taken together, make a more than ordinarily strong case. We do not, however, agree with the position taken by the counsel for the plaintiff in error, that an answer in equity in response to a bill, is to be held uncontrovertible, unless contradicted by two witnesses or one witness and circumstances. That is the rule when the answer is to be weighed and compared with other *witnesses*. But an answer may contradict itself; may be unreasonable or state impossible facts, and when this is the case, its credibility is liable to be attacked, as the statements of other witnesses. We might have one witness opposed to two witnesses,

or even more, and yet we might believe the one against several, and have good, substantial, legal reasons for it: Gresley, Eg. Ev.

As against this array of the defendant's testimony, there were his own letters, his admissions in giving in his tax, and his settlement with the complainant's brother, together with the reasonableness and propriety of the view that this was a trust, and the very unusual conduct of the grand-father, on the supposition that this was originally such a deposit as it set up. Still, it was *possible*, and all the admissions and acts of the defendant are explainable on this hypothesis, since even in the event supposed he would be a conditional trustee, and might well so consider himself, especially if he felt certain that his father would not revoke his bounty to these grand-children.

We think this is just one of the cases where the *discretion* of the Court is a material element. Had he refused a new trial we should not interfere with his judgment. As he has *granted* it, we will interfere with even more reluctance, since the only effect of the ruling is to give the parties another hearing. Another jury may, perhaps, look more to the actual testimony, and less to the equity and reasonableness of the claim set up by this lady on the bounty of her grand-father. We incline to think that the jury have been unable to divest themselves of the feeling that whatever the evidence may show, the right of the matter is with the complainant, and that it is due to the powerful array of evidence presented by the defendant, that the case be submitted to another jury. We do not think, therefore, that this is a case of an illegal use of the discretion vested by law in the Circuit Judge, and we shall not interfere with his decision.

Judgment affirmed.

Loyd *et al.* *vs.* The State of Georgia.

FRANK LOYD *et al.*, plaintiffs in error *vs.* THE STATE OF GEORGIA, defendant in error.

Where an indictment for burglary charged the parties with being accessories before the fact, and several witnesses were introduced who testified to the finding of the goods stolen in the possession of such parties. there being no evidence that they concealed the crime from the magistrate *and harbored*, etc., the principal; and the Judge charged the jury, "if they found from the testimony that the defendants procured a burglary to be done, and instigated the perpetration by reward or hope thereof, and afterward received the goods, knowing them to be stolen, it would authorize them in finding the defendants guilty as accessories after the fact," and in the same connection, "If they found from the evidence that the defendants concealed the crime or harbored the principal to prevent his arrest, then, in contemplation of law, they were accessories after the fact," and a motion was made in arrest of judgment and for a new trial which was overruled by the Court:

***Held*, The Court erred in its charge to the jury, and ought to have granted a new trial, under the facts in this case.**

Criminal law. Acccessories. Arrest of judgment. Before Judge SCHLEY. Chatham Superior Court. January Term, 1870.

The indictment charged John Quarterman, Frank Loyd and James Ward, negroes, with burglary in the day time. It first charged Quarterman, in the usual form, as the actual perpetrator of the crime, and then charged "that the said Frank Loyd and James Ward, in the county aforesaid, on the day and year aforesaid, and before the committing of the felony, burglary and larceny aforesaid, in manner and form aforesaid, were accessories thereto before the fact, and did, then and there, unlawfully, burglariously and feloniously incite, move, conceal, help and procure, aid, abet and command the said John Quarterman to do and commit the felony, burglary and larceny in manner and form aforesaid. And the jurors aforesaid, upon their oaths aforesaid, do say that the said Frank Loyd and James Ward in the county aforesaid, afterward on the day and year aforesaid, well

knowing the said John Quarterman to have done and committed the felony, burglary and larceny aforesaid, in manner and form aforesaid, they the said Frank Loyd and James Ward, did then and there knowingly, feloniously, burglariously and unlawfully conceal, maintain and assist said John Quarterman in the aforesaid felony, burglary and larceny, contrary to the laws of said State," etc. It concluded with a count against the three for simple larceny of the goods.

Quarterman was tried and found guilty in 1868. In 1869 Loyd and Ward were tried. The evidence showed that Loyd told Quarterman where he could get the goods, furnished keys to unlock the doors, and stated what he would pay for their delivery at his; Loyd's, junkshop, that Quarterman and others did go and get the same and delivered them to Loyd, at said shop, who took steps to destroy the marks, etc.; the goods were searched for, Loyd lied about their being in his possession, but they were found there.

The burglary by Quarterman and others was shown and Quarterman's conviction was admitted. There was no other material evidence as to Loyd. There was none as to Ward except that he was present when the junkshop was searched. The bill of exceptions says the Court was requested to charge the jury: 1st. That under this indictment they could not convict defendants "as accessories after the fact." 2d. That the buying or receiving of stolen goods, even knowing the same to have been stolen, would not constitute the defendants accessories after the fact under this indictment. The Judge says he had no requests to charge, in writing, and did not remember refusing the second request, but that he charged: "As an isolated fact, the receiving of stolen goods, knowing them to be stolen would not constitute an accessory after the fact, under the indictment. But if defendants procured the burglary to be done, and, having instigated the perpetration by reward or the hope thereof, afterwards, received the goods, knowing them to be stolen, then it would authorize the jury to find defendants guilty as accessories after the fact. If de-

fendants concealed the crime from the officers of the law, or harbored Quarterman to prevent his arrest, they were accessories after the fact." The jury found both defendants guilty "as accessories after the fact."

Their counsel moved for a new trial, upon the grounds that the Court erred in not charging as requested, and because the verdict was contrary to the law and evidence, and for arrest of judgment, because the verdict found defendants guilty of an offense not charged in the indictment. The Court overruled both motions, and that is assigned as error.

HARTRIDGE & CHISOLM, for plaintiffs in error.

ALFRED B. SMITH, Solicitor General, for the State.

LOCHRANE, C. J.

This was an indictment for burglary, tried in Chatham Superior Court, in which these two plaintiffs in error were found guilty as accessories after the fact; and the case presents two points for the adjudication of this Court. First, whether the indictment charges sufficiently in law the offense; and secondly, whether the evidence sustains it; and we may add, thirdly, whether the charge of the Judge was a proper statement of the law in this case.

The indictment charges Loyd and Ward with being accessories before the fact. Its language is: "And did then and there unlawfully, burglariously, and feloniously incite, move, conceal, help, and procure, aid, abet, and command the said John Quarterman to do and commit the felony," etc. Under this indictment, several witnesses were introduced who testified as to the burglarious taking of some cotton which was traced to the place of these parties and there found; but there was no evidence that they concealed the crime from the magistrate, and harbored, assisted and protected, etc., the person charged with the crime as principal. The Judge charged the jury: "As an isolated fact, the receiving of sto-

len goods, knowing the same to have been stolen, would not constitute an accessory after the fact under the indictment." In this proposition we concur with the Court, because that was, in itself, a separate and distinct offense, punishable by law; but the Court went farther and charged the jury: "If they found, from the testimony, that the defendants procured a burglary to be done, and, having instigated the perpetration by reward or the hope thereof, afterwards received the goods, knowing them to be stolen, then it would authorise them to find the defendants guilty as accessories after the fact." This was error; for, under the facts stated by the Court, they would be guilty as accessories before the fact.

Again, he charged the jury: "That if they found, from the evidence, that the defendants concealed the crime from the officers of the law, *or harbored* the defendant, Quarterman, to prevent his arrest, then, in contemplation of law, they were accessories after the fact." This was error. An accessory after the fact is a person who, after full knowledge that a crime has been committed, conceals it from the magistrate *and* harbors, assists, or protects the person charged with or convicted of the crime. The language of the Court was "concealed the crime from the officers of the law *or* harbored." The language of the law is, "conceals it from the officers of the law *and* harbors," etc. In the second branch of the charge of the Judge below, he uses the words, "and afterwards received the goods, knowing them to be stolen, it would authorize them to convict, as accessories after the fact." In the opinion we entertain of the law, and as this case comes before us on a motion in arrest of judgment and for a new trial, no matter what may be our personal opinions of the criminality of the parties, inasmuch as it involves their liberty, we are constrained to give the parties the exact measure of their legal rights; and we hold that, in this classification of the offense, both at common law and under our statutes the law contemplates some assistance or act done to the felon himself, and is distinct from the crime of receiving stole

goods from the felon, except such taking is for the purpose of facilitating his escape from justice, or attended with some benefit. 1st Hale, 618; 4 Blackstone, 37; 1st Chitty, 264, concur in the definition that an accessory after the fact is where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. As to what shall be esteemed within these general definitions depends upon the facts in the particular case; but to receive stolen goods, knowing them to be stolen, did not fall under any of the definitions of the common law, and did not constitute the receiver an accessory, but was, in itself, a distinct and separate offense: 1st Bishop, section 493. The receiver of stolen goods, knowing them to be stolen, is not an accessory, according to our definition, because he renders no aid to the principal felon. Nor, in speaking of the common law, do we overlook the statute, 3 and 4 W. & M., or of 1st and 5th Ann, but after a review of the whole subject, and in view of the provisions of our own Code, which makes this a distinct offense as accessory after the fact, we lay down the true test to be to consider whether what he did was done by way of personal help to his principal, with a view to enable the principal to elude punishment; and it is unimportant as to what assistance was rendered, provided it was done with a view to aid the principal to elude or escape punishment. In the view, therefore, we take of the law of this case, we think the Court erred in overruling the motion for a new trial, on the grounds stated.

Judgment reversed.

LYMUS HOLLOWAY, plaintiff in error *vs.* FRANKLIN L. BRINKLEY, defendant in error.

When a contract was made by a freedman and a landlord, to make a crop for one year, by which the landlord, was to furnish the land and stock, and the freedman to work the same, and to receive for his labor one-half of the crop made thereon:

Held, That such a contract did not make them partners, and that if the landlord refused or neglected to pay or deliver to the freedman, the one-half of the crop made on land, but appropriated the same to his own use, the freedman could make out an account against the landlord for the value of his share of the crop, and enforce the same by attachment, or otherwise. It is the duty of the Courts to see that this class of contracts are performed in good faith on the part of the landlord to the laborer who makes the crop on his land, when the laborer performs his part of the contract.

Attachment. Partnership. Before Judge CHISOLM. City Court of Savannah. July Term, 1870.

Holloway had an attachment against Brinkley levied upon three bales of cotton. He averred that Brinkley was "indebted to him in the amount of three bales of Sea Island cotton of about the value of $500 00, which indebtedness accrued by reason of a verbal contract to work and labor together in raising a crop of cotton during the year 1869, the said Lymus Holloway to receive one-half of the whole amount of cotton raised;" they made six bales of such cotton; Brinkley appropriated three of them to his use, and has taken possession of the other three as his own. There was another count for $500 00 by reason of the facts aforesaid. Holloway testified that he and Brinkley, in the spring of 1869, "agreed to farm together for that year;" Brinkley was to furnish the stock and lands, Holloway to board himself and have half the crop. They made six bales of cotton. Brinkley took the three first and largest, saying that Holloway might have the other three, but subsequently shipped them away for himself without Holloway's consent, and would not settle with Holloway. These bales weighed each from three

idred and twenty to three hundred and forty pounds. He
l "the cotton in suit is my cotton; my title and right to
cotton is based upon the contract for half the crop made
h Brinkley, and upon his promise to give it to me."
Another witness testified that Brinkley employed Hollo-
y to cultivate Brinkley's farm, and was to give him half of
crop, and that, in February, 1870, such cotton was worth
y cents per pound, and that from Brinkley's statements as
he quantity made, Holloway's share was about nine hun-
d pounds. There were two other witnesses who testified
t Brinkley employed Holloway to cultivate his farm, and
s to pay him half the crop for his work, and that he did
work and made said cotton. Here Holloway closed his
se.

Brinkley's counsel moved for a non-suit on the ground
t it was apparent that this was an effort to settle a part-
rship, and that that could only be done in a Court of
uity; that the evidence showed that Holloway had levied
his own cotton, and that while trover might lie, he could
t recover in an action *ex contractu*. The non-suit was
nted, and that is assigned as error.

Tompkins & Garrard, by A. M. Sloan, for plaintiff in
or. This is not partnership: 6th Fla. R., 142; 9th, 22;
ompson's Dig. 230, 231; Acts of Fla. 21st February,
70; 1 Clifford's C. C. R., 36, 37; Revised Code Georgia,
tions 1877, 1880; 39th Ga. R., 125; 40th, 328. But if
rtnership, it was dissolved: Story on P., secs. 280, 326.
nversion made Brinkley liable at law: Story on P., sec.
3; Revised Code Georgia, sections 2903, 2904; 7th Ga.,
1; 10th Mass. R., 435, 436; 3 Phil. on Ev., 405; 2 Gr.
Ev., 108. Attachment on money demand *ex delicto*:
vised Code, sec. 3210; 18th Ga. R., 364; 28th, 323; 37th,
Brinkley is estopped: Phillips and Greenleaf, *supra;*
Hilliard on T., 42, N. 6. Especially after replevy: Rev.
, sections 3243, 3252; Drake on Attachments, 332, 339

But if they were owners in common, conversion made good basis of action: Revised Code, sections 2276, 2277, 3503, 3504. Not necessary to go into equity: Revised Code, sections 3027, 3930; 19th Ga. R., 599; 35th, 84; 37th, 364. It was wrong to grant non-suit on variance: Revised Code, sections 3215, 3269, 3270; 13th Ga. R., 311; 18th, 510; 29th, 84; 36th, 602; 37th, 18; 39th, 82.

J. HARTRIDGE, R. E. LESTER, for defendant.

WARNER, J.

The facts disclosed by the record in this case did not make the plaintiff and defendant partners. If the defendant as the landlord refused or neglected to pay or deliver to the plaintiff one-half of the crop, under the contract, for his labor in making it, but appropriated it to his own use, the plaintiff could make out an account against the landlord for the value of his share of the crop, and enforce the collection of the same by attachment, or any other lawful remedy. It is the duty of the Courts to see that this class of contracts are performed, in good faith, on the part of the landlord to the laborer who makes the crop on his land, when the laborer performs his part of the contract, and it was error in the Court below in granting the non-suit.

Let the judgment of the Court below be reversed.

Couper *et al. vs.* Rowe *et al.*

WILLIAM A. COUPER *et al.*, plaintiffs in error, *vs.* JAMES F. ROWE *et al.*, defendants in error.

This is a bill filed by the complainants as citizens and tax-payers of the county of Glynn, in behalf of themselves and other citizens and tax-payers of said county, against the Ordinary, Tax Receiver and Tax Collector thereof, praying for an injunction to restrain the collection of an extraordinary tax of one hundred and fifty per cent. on the State tax, for county purposes, as provided by an Act of the General Assembly, of the 11th March, 1869. The injunction was refused by the presiding Judge of the Court below, and the complainants excepted. The Act of 1869 authorizes the Ordinary of said county, by and with *the consent of two-thirds* of the grand jury, to levy an additional tax on the State tax of one hundred and fifty per cent., for county purposes, and repeals all conflicting laws. It is not pretended that, at the time this extraordinary tax of one hundred and fifty per cent. was levied by the Ordinary for county purposes, two-thirds of the grand jury of the county had consented that it should be levied, but the Ordinary claims the right to levy this extraordinary tax under the 545th section of the Code, because the grand jury at its last sitting failed to recommend said tax, or to take any action in the matter:

Held, That the Ordinary of Glynn county, under the general law of the State, had only the right (in case the grand jury failed or refused to recommend the levy of an extra tax, for county purposes,) to levy such tax, not *exceeding fifty per cent.* on the State tax; *provided*, the levy of such extra tax was necessary to discharge any judgment against the county, or any debt, for the payment whereof there was a *mandamus* against the county, or for the necessary current expenses of the county for that year; and that the order levying such extra tax should clearly and distinctly specify the objects for which it is levied.

Held further, That the Ordinary of Glynn county had no authority, without the consent of two-thirds of the grand jury, to levy the extraordinary tax of one hundred and fifty per cent., under the Act of 1869, and that the Court below erred in not granting the injunction restraining the collection of the same.

County Tax. Before Judge SESSIONS. Glynn Superior Court. December Term, 1870.

On the 1st of August, 1870, Rowe, as Ordinary of Glynn county, ordered that one hundred and fifty *per centum* be levied upon the State tax, for county purposes, for 1870, ac-

cording to section 545, Revised Code, allowing Justices of the Inferior Court to levy such tax, without a recommendation of the grand jury. The reasons for this order, recited in it, were, "it will be necessary to levy a tax, for county purposes, for the year 1870, and the grand jury, at its last session, failed to take any action or make any recommendation in the premises."

In November, 1870, Couper and others, as tax-payers of said county, and in behalf of all the tax-payers of the county, brought their bill against Rowe, as Ordinary, and against the Tax Collector and Receiver, praying an injunction against the collection of said tax, upon the following grounds: By Act of 11th of March, 1869, the Ordinary of Glynn was authorized to levy a tax of one hundred and fifty *per centum* upon the State tax, for the use of the county; *provided*, the grand jury of said county should first authorize him so to do by a vote of two-thirds of that jury. Yet, without such recommendation from the grand jury, Rowe issued said order, the Collector assessed said *per centum*, and the Tax Collector is proceeding to collect the same from the tax-payers. No statement of the financial condition of the county and the amount required to pay its liabilities for 1870, prepared by the County Treasurer, under the supervision of the Ordinary, was presented to the foreman of the grand jury, at the Spring Term of said Court, or at any time before the assessing of said tax. Wherefore, the proceeding is illegal and void.

The bill called Rowe the pretended Ordinary, but does not state why he is not the legal Ordinary. The Chancellor ordered the defendants to show cause why the injunction should not be granted. The cause was not heard till December, 1870. They showed for cause that the failure of the grand jury to make such recommendation cast upon the Ordinary the right and duty of assessing such tax as was necessary for county purposes, and exhibited the receipts of the county, from different sources, and its liabilities for that year, and

aid that $9,200 00, besides interest on the bonds of the ounty, were due in February and July, 1870, besides $10,-00 00 of bonds, to fall due in February and July, 1871, nd that one hundred and fifty *per centum* upon the State ax would raise but $9,481 55.

In support of this showing, defendants presented a report igned by three persons, as the finance committee of the grand ury of the Fall Term of 1870, of the Superior Court of said ounty, in which they simply said that, "after investigating he Treasurer's books, we find the following statement of the Treasurer of Glynn county correct, and recommend to the Ordinary the necessity of the assessment and collection of one hundred and fifty per cent. on the State tax for county purposes;" and the affidavit of these three persons that the report was correct. Whether this report is the one aforesaid, does not appear. When defendants offered to read said report in evidence, it was objected to because it was a secret of the grand jury and ought not to be made public until the grand jury makes and publishes its general presentments. This was overruled and the report was read. They then read an affidavit from the former Treasurer, in which he affirmed that the grand jury for the former term (July, 1870) had his books and inspected them, thereby showing the financial condition of the county as shown in said books. Here defendants closed.

Complainants read the affidavit of the foreman of the grand jury, then in session, in which he affirmed that the grand jury had not acted upon said report, but had refused to do so, and that Rowe had possession of it "unlawfully." They also read an affidavit by four persons, affirming that they were of the grand jury of the July Adjourned Term, 1870, and that no statement, showing the financial condition of said county, was made to the grand jury, showing the amount of money received and disbursed during 1869, or showing the present financial condition of the county and the amount of tax required to be assessed to carry on the

financial affairs of the county. After argument had, the Chancellor refused theinjunction. That is assigned as error.

HARRIS & DAVENPORT, by COLLIER & HOYT, for plaintiffs in error. County tax may be enjoined: R. Code, sec. 537; 27th Ga. R., 354; 8th, 23. The Ordinary of Glynn county cannot act without recommendation of grand jury: Acts 1869, 178; Const. 1868, Art. 11, Sec. IV. This local Act repeals conflicting laws: 8th Ga. R., 23; it repeals sec 545 of R. Code as to Glynn county. This tax is not assessed as required by sections 544, 545 and 550 R. Code. The injunction should have been granted: 18th Ga. R., 47; 8th, 23.

HARRIS & WILLIAMS, for defendants, furnished no brief to Reporter.

WARNER, J.

The Ordinary of Glynn county had no authority, under the statement of facts disclosed by the record, without the consent of two-thirds of the grand jury, to levy the extraordinary tax of one hundred and fifty per cent. under the Act of 1869. The Ordinary, under the general law of the State, had only the right (in case the grand jury failed or refused to recommend the levy of an extra tax for county purposes) to levy an extra tax not *exceeding fifty per cent.* on the State tax; provided, the levy of such extra tax was necessary to discharge any judgment against the county, or any debt for the payment of which there was a *mandamus* against the county, or for the necessary current expenses of the county for that year: Code, sections 543, 545.

And the order of the Ordinary levying such extra tax should clearly and distinctly specify the objects for which such extra tax was levied. It is also the duty of the Ordinary of the county to see that by the time of the organization of the grand jury, there has been prepared by the County

easurer, under his supervision, a statement of the financial ndition of the county, and the amount of tax required to scharge the county liabilities for that year, which should presented by the Treasurer to the foreman of the grand ry, on the first day of the Court for their inspection: Code, 4. It was error in the Court below to refuse the injunon restraining the collection of the extraordinary tax of one ndred and fifty per cent. as prayed for in the bill of the mplainants.

Let the judgment of the Court below be reversed.

GEORGE W. AVERA, sheriff, plaintiff in error *vs.* WILLIAM J. VASON, executor, defendant in error.

this case there being no appearance for the plaintiff in error, the defendant moved the Court to open the record, and prayed for an affirmance of the judgment of the Court below, with damages for delay.

Held, That the defendant was entitled to an affirmance of the judgment on the statement of facts contained in the record, and that damages be awarded as provided by the 4221st section of the Code for delay in bringing the case up to this Court.

If a sheriff sell land and put the purchaser in possession without collecting the bid, he will be made to pay the money. (R.)

Practice. Supreme Court. Damages. Before Judge CLARK. Calhoun Superior Court. March Term, 1870.

In September, 1869, a mortgage *fi. fa.*, in favor of William J. Vason, executor of Turner Clanton, against William J. Bray, was issued from said Court. On the 4th of October, 1869, Avera, the sheriff, levied it upon the mortgaged lands. At March Term, 1870, he was ruled by the plaintiff. He answered, that on the first Tuesday of December, 1869, he sold said land to one Dunn, at $2,000 00, but Dunn had not complied with the terms of the sale. He admitted that he had put Dunn in possession of the land, and that

Dunn then had exclusive possession of it. He asked further time to readvertise and resell the land. The Court granted an order absolute, requiring Avera to pay said $2,000 00 to plaintiff. This was followed by attachment *nisi*, and attachment absolute. Avera sued on his writ of error, averring that the Court erred in granting the first rule absolute.

When the cause was called here there was no appearance for Avera. Counsel for Vason moved to open the record and have the judgment affirmed, under Rule 22d, of this Court, and asked for damages for delay.

C. B. WOOTEN, for plaintiff in error.

No appearance for defendant.

WARNER, J.

On the statement of facts disclosed by the record in this case, the defendant is entitled to have the judgment of the Court below affirmed, and is also entitled to have damages awarded, as provided by the 4221st section of the Code, for delay in bringing the case up to this Court.

Let the judgment of the Court below be affirmed, and damages be awarded.

F. K. WRIGHT, plaintiff in error, *vs.* MARTHA MCBRIDE, defendant in error.

When there was no defense to an action on a promissory note and judgment was rendered thereon, and a motion was made at the same term of the Court to set it aside, on the grounds that it was not signed by the plaintiff's attorney, but by the Judge, as provided by the 38th rule of Court; that the plaintiff was not stated in the judgment as "administratrix," and because the judgment did not recite the fact that Wright was "security." The Court overruled the motion and allowed the judgment to be amended so as to insert the word "administratrix," as to the plaintiff, and the word "security," as to the defendant, Wright:

Wright *vs.* McBride.

There was no error in overruling the motion to set aside the judg-
t and allowing the same to be amended.
urther, That there was no error in the refusal of the Court to al-
the judgment to be opened so as to enable the defendant, Wright,
e his plea to the original suit, on the statement of facts contained
e record.

rest of Judgment. Amendment. Practice Supreme
. Before Judge CLARK. Dougherty Superior Court.
Term, 1870.

e complaint of "Martha C. McBride, administratrix"
mes H. McBride, averred, "that James H. Hill and
Wright, surviving partners of the firm of said Hill,
ht & James Marshall, said firm composed of said Hill,
ht & James Marshall, deceased, makers, Frank K.
ht, security," were indebted to the petitioner "$1,687 50,
es interest on a promissory note, dated January 1st,
, and due twelve months after date." It prayed process
st "said defendant." The process stated the cause thus:
rtha McBride, administratrix, vs. James H. Hill, John
ht and Joseph Marshall, administrators of James Mar-
, and F. K. Wright, security. Complaint," and began,
defendants are hereby required," etc. The copy-note
"twelve months after date, I promise," etc., and was
d, "Hill, Wright & Marshall. F. K. Wright, secu-
Hill and F. K. Wright were served. There was a
n of *non est inventus*, as to "John Wright and Mar-
." A second original was issued, and on it J. R. Mar-
, as administrator of J. F. Marshall, acknowledged ser-
Another second original was issued and John Wright
erved.
plea was filed, though the suit was brought in 1867.
ne, 1870, judgment by default was rendered "by the
for the plaintiff against defendant," for $1,687 50, and
t, and was signed by the Judge officially, but not by
intiff's attorneys. During June Term 1870, counsel
K. Wright moved to arrest said judgment: 1st. Be-

cause it was not signed by plaintiff's attorneys. 2d. Because the judgment is in favor of Martha McBride, individually, and not as administratrix. 3d. Because it is against all the defendants, "When John Wright and James H. Hill had been discharged in bankruptcy from said debt, and that fact was pleaded and admitted, as appears by the entries upon the Judge's docket." 4th. Because the judgment includes Marshall as administrator, who is included in the process but not in the declaration. 5th. Because process issued against Marshall, administrator, when he was not sued. 6th. Because F. K. Wright is but a security, and yet the judgment is not against him as such.

The Court overruled the motion. Plaintiff's counsel then moved to "amend their judgment so as to make the whole record harmonize." F. K. Wright's counsel objected, because this amendment would make a new and distinct judgment, and because he had a valid defense under the Relief Act of 1868, which he wished to make, but was prevented from doing so, by hearing that the Court was enforcing the resolution of the General Assembly, suspending all proceedings by the Courts on contracts made prior to June, 1865, by passing over all such cases, and knew not the contrary until he heard of this judgment. They insisted that if the judgment was open to amendment, the cause was open to defenses, and they presented his sworn plea in which he averred that he was not interested in said note, was a bare security, that it was given for bank bills loaned said firm by McBride, which bills had become valueless by the result of the late war, that at the date of the note said firm was worth $50,000, specifying their property; that he then had over one hundred slaves, that all this property was lost by the result of the war, and Hill & Wright were discharged in bankruptcy; that Marshall's estate had become insolvent by emancipation, that McBride and his said administratrix, since his death, contributed to said war by being citizens of Georgia and of the Confederate States, and supporting said government, and

uring the war, McBride refused to take Confederate
cy in payment of said note, though James H. Hill
ed the same to him. He claimed the benefit of the
Act of 1868. The Court refused to allow said de-
lled, and allowed the judgment to be amended by add-
er "plaintiff," "as administratrix of James H. Mc-
deceased," and after "defendant" "as security," and
ng the names of James H. Hill, John Wright and J.
rshall, administrator, to be omitted from the judgment.
s not appear that any other judgment was entered up
e old one stood amended by said order.

K. Wright's counsel say, that the Court erred in not
ng the judgment on said grounds, in refusing to allow
fense to be filed, and in allowing said amendment made.
ien the cause was called here, counsel for Wright said,
r the want of the judgment and amended judgment in
ord, this Court could not understand the errors com-
l of, and upon this suggestion of diminution of the
, moved to continue the cause. The motion was over-
)

nsel for plaintiff in error then moved to dismiss the
f error, because the bill of exceptions had not been sent
this Court in time. It was filed below on the 4th of
1870, and here on the 25th of July, 1870. The motion
erruled.)

ON, DE GRAFFENREID & IRVIN for plaintiff in error,
rrest of judgment, cited Tidd's Pr., 918; 21st Ga. R.,
71; 18th, 275. As to form of judgment *vs.* surety:
sec. 3414. To entries on Judge's docket: 4th Ga. R.,
As to relief plea: Acts of 1868, page 148.

IES & HOBBS for defendants.

NER, J.

find no error in the judgment of the Court below in
on the statement of facts contained in the record.
the judgment of the Court below be affirmed.

Munroe *et al. vs.* Dumas.

L. D. MUNROE *et al.*, plaintiffs in error, *vs.* COVINGTON DUMAS, administrator, defendant in error.

1. A case was tried on the equity side of the Court, in the year 1857, and the jury returned a verdict for a specific sum of money in favor of the complainant, against the defendant, and the complainant's attorneys entered up a judgment thereon, reciting that the jury had returned a decree, etc., setting forth the substance thereof, which was signed by the plaintiff's attorneys but was not signed by the presiding Judge as Chancellor. In September, 1870, a motion was made to set aside that judgment, or decree, on the ground that it was not a valid judgment or decree of a Court of Equity, inasmuch as it was not signed by the presiding Judge as Chancellor, as required by the 4153d section of the Code, which motion was overruled and the movant excepted:

Held, That the jurisdiction for the trial of equity causes in this State was vested in the Superior Court, in which this judgment or decree was rendered, and that this was a judgment or decree of *that Court*; and having been rendered prior to the adoption of the Code, under the general rule of practice that prevailed in most of the Courts of the State at that time, it ought not now to be set aside on the ground that it was not signed by the Chancellor, even if, under the Constitution and laws of this State vesting the jurisdiction and regulating the trials of equity causes, the decree rendered on the verdict of a jury is now required to be signed by the Chancellor, in order to constitute it a valid decree. The Code is certainly directory in regard to that matter, and should be followed in all cases tried since its adoption, but when it is signed as required by the Code, is it the judgment or decree of *the Chancellor*, or is it the judgment or decree of *the Superior Court?*

2d. When a plaintiff in error gives bond and security to obtain a *supersedeas* of the judgment, as provided by the 4203d section of the Code for the payment of the eventual condemnation money, and the judgment is affirmed, the plaintiff in the Court below may have an execution against the principal and security on the *supersedeas* bond without formally entering up the judgment against such security; the judgment of affirmance binds him as such security for the eventual condemnation money in that case, though an order on the minutes of the Court to that effect, would make the record more perfect and complete.

Under the facts contained in this record, the judgment, or decree on which the execution issued, was not dormant.

Practice. Surety. Variance. Before Judge CLARK. Calhoun Superior Court. September Term, 1870.

Elizabeth Jones filed a bill againt Jesse Robinson; the jury returned a verdict for $2,885 45, and on the 25th of November, 1858, a decree was entered up for $2,885 40, which was signed by her solicitors, but not by the Judge. Robinson gave bond to supersede this judgment, and carry the cause to the Supreme Court. L. D. Munroe was his security on this bond for "the eventual condemnation money and costs." In January, 1858, the Supreme Court affirmed said judgment, (see 27th Georgia Reports, 266.) When the *remititur* was entered upon the minutes of the Superior Court, a judgment was entered against Robinson and Munroe, as his security, for the costs in the Supreme Court, but no judgment was entered against Munroe for the amount of said verdict.

On the 6th of June, 1859, a *fi. fa.* was issued for the principal, interest and costs against Robinson as principal, and Munroe as security. On the 18th of March, 1864, Robinson handed the sheriff $3,988 40 in Confederate currency, as a payment on the *fi. fa.* The sheriff made no entry on the *fi. fa.*, except a memorandum as follows: "18th March, 1864." On the 24th of March, 1864, her solicitor received said Confederate currency from the sheriff, and entered a statement of the fact upon the *fi. fa.* At the next term of the Court he brought these facts to the notice of the Court, claimed that the *fi. fa.* was not paid, and asked that it be ordered to proceed for a balance claimed to be due thereon. The Judge held that said currency should stand as a credit for only two-thirds of its nominal value, and ordered the *fi. fa.* to proceed for the balance. This order was affirmed by this Court in December, 1869. (See 40th Georgia Reports, 353.) This last judgment having been complied with by crediting the *fi. fa.* with two-thirds of the nominal value of said currency, a levy was made for the balance, on Munroe's property on the 3d of August, 1870.

In September, 1870, Munroe's counsel moved to set aside said *fi. fa.* because the decree was not signed by the Judge,

because there was no decree against Munroe, nor any judgment against him, because the *fi. fa.* was not for the amount of the decree, (there was five cents variance in the principal) and because the judgment was dormant.

The said records and bond were read in evidence, and the motion was overruled. That is assigned as error on each of said grounds.

B. S. WORRILL, E. L. DOUGLASS, C. B. WOOTEN, by R. H. CLARK, for plaintiff in error.

VASON & DAVIS, R. F. LYON, HOOD & KIDDOO, for defendant.

WARNER, J.

In reviewing the grounds of error assigned to the judgment of the Court below, on the statement of facts disclosed by the record in this case, we are of the opinion that the judgment of the Court below should be affirmed, and it is so ordered.

Judgment affirmed.

THOMAS H. CLARK *et al.*, plaintiffs in error, *vs.* HERRING & MOCK, defendants in error.

A bill praying for an injunction was presented to the Judge for his sanction, and a rule *nisi* was granted, calling upon the defendants to show cause, on the day therein named, why the injunction should not be granted, which was duly served on the defendants, but they failed to appear and show cause on the day named by the Judge, and afterward the Judge granted the injunction. Whereupon the defendants, by their counsel, petitioned the Judge to suspend his order granting the injunction, which was refused, and the defendants excepted.

Held, That there was no error in the refusal of the Judge to grant the petition to suspend his order granting the injunction, on the statement of facts contained in the record; that their remedy was to move a dissolution of the injunction in manner prescribed by law in such cases, if they desired to get rid of it.

Clark *et al.* *vs.* Mock.

Equity Practice. Injunction. Before Judge STROZER. Dougherty Superior Court. Chambers. December, 1870.

Herring & Mock filed a bill for injunction against R. H. and M. J. Towns, administrators of A. J. Towns, deceased, B. A. Collier and Thomas H. Clark. On the 6th of October, 1870, Judge Clark ordered the defendant's to show cause, *instanter*, before him, in Chambers, why this injunction should not be granted. This order was not served. Said county, *ad interim*, became part of the Albany circuit. On the 19th of November, 1870, Judge Strozer ordered the defendants to be served with a copy of the bill, and that they show cause, before him, in Chambers, on the 26th of November, 1870, why the injunction should not issue. Collier, Clark, and one of the administrators, acknowledged service and waived a copy on the 21st of November, 1870. The other administrator was not served.

No appearance was made on the 26th of November, by either side. On the 2d of December, 1870, no answer had been filed, nor any appearance made by defendants, and the Judge ordered the injunction to issue as prayed for. Its operation was to prevent Clark, who was sub-lessee under Collier, from keeping a bar in a hotel in which complainants claimed an exclusive right to do so, by virtue of a contract with A. J. Towns, who owned the hotel and had leased a bar-room in it to complainants for five years.

This injunction issued, and was served on the 3d of December. On the same day, the defendants appeared in the Judge's Chambers and asked him to suspend said order, upon their verified showing, as follows: They acknowledged service to accommodate the Clerk, supposing they had to answer the bill at the next term of the Court, (which was to sit on the 5th of December, 1870,) and the counsel whom they wished to employ was absent from home; they knew nothing of any intended action in the premises till they were served with said order. No appearance was had on the 26th of

November; the complainants only appeared on the 2d of December, and the proceeding was wholly *ex parte*. They further denied the fact of the making of the pretended contract with A. J. Towns, on which the bill was bottomed, and attacked its validity, in law, if made as alleged. Judge Strozer refused to suspend the injunction, and that refusal is assigned as error.

VASON & DAVIS, by R. H. CLARK, for plaintiffs in error.

D. H. POPE, by Z. D. HARRISON, for defendants.

WARNER, J.

There was no error in the refusal of the Judge below to grant the petition to suspend his order granting the injunction, on the statement of facts disclosed by the record in this case; the proper course for the defendants to have taken, was to move for a dissolution of the injunction in the manner prescribed by law in such cases, if they desired to get rid of it.

Let the judgment of the Court below be affirmed.

EPHRAIM PONDER, plaintiff in error, *vs.* JAMES A. MCGRUDER, defendant in error.

When an action was instituted for rent of land by the plaintiff, who rented the premises to the defendant, and it was proved, on the trial, that the plaintiff was trustee for his wife and children, (the trust deed not being in evidence) and that the rents and profits of the land belonged to the plaintiff:

Held, That the action was properly brought in the name of the plaintiff who rented the premises to the defendant, without declaring that he sued for rent as trustee.

The motion for a continuance of the case was properly overruled on the statement of facts contained in the record, to-wit: the absence of the party.

Continuance. Evidence. Rent. Before Judge GIBSON. Richmond Superior Court. May Term, 1870.

Ponder *vs.* McGruder.

McGruder, in his own right, sued Ponder for rent, returnable to May Term, 1870, of said Court. When the cause was called for trial, Ponder's counsel moved for a continuance, but on what ground does not appear. It is said in the bill of exceptions that it was because Ponder was providentially kept away by sickness. The Judge, however, certifies that it did not appear that Ponder was sick, and that "no sufficient cause for continuance was shown." It does not appear why his presence was necessary, and by the affidavit hereinafter mentioned, it *seems* that his counsel did not know he was sick till after the trial. The continuance was refused and the cause was tried at said term. On the trial McGruder swore to the correctness of his account for rent, that he rented the property to Ponder and said nothing about holding it as trustee; that, in fact, the property was settled in trust upon his wife and children by deed, and is still held by him as trustee under said deed, but by the terms of the deed, the rents and profits of the property were his individually. This was all the evidence. The jury found for plaintiff. Defendant moved for a new trial upon the ground that the verdict was contrary to law and evidence, because the Court erred in charging the jury that plaintiff could recover in his individual capacity, and because the defendant was detained from Court by sickness, had a good defense, and yet his motion for a continuance was overruled.

This last ground was supported by Ponder's affidavit, in which he stated that he was absent from Court "on account of sickness;" that he would have advised his attorney of the cause of his detention from Court, had he not been under the impression that it was the appearance term of said cause, and that the same would not come up for trial until the November Term of the Court;" "that he had a good and valid defense to said writ, and would have been present, with his witnesses to make out his defense, if he had not been deceived as to the term for the trial of said cause." What his

defense was, does not appear, by plea or otherwise. The Court refused a new trial, and that is assigned as error.

JOHN J. JONES, for plaintiff in error.

S. A. CORKER, for defendant, cited Code, secs. 3186, 3192.

WARNER, J.

The motion for a continuance of the case was properly overruled, on the showing made therefor. The defendant rented the premises of the plaintiff, to whom the rents and profits thereof belonged, according to the evidence disclosed in the record, and the action was properly brought in his name to recover the rent due from the defendant, under his contract with the plaintiff, without describing himself as trustee.

Let the judgment of the Court below be affirmed.

GEORGE H. LESTER *et al.*, administrators, plaintiffs in error, *vs.* THE GEORGIA RAILROAD & BANKING COMPANY, defendant in error.

Inasmuch as the plaintiffs' intestate accepted the check of Jones, the treasurer, for the balance due him on certificate of deposit, the bank was only bound to pay that check in such funds as Jones, the treasurer, had on deposit therein, and if the holder of that check declined or refused to receive in payment thereof such funds on its presentation, that was not such an appropriation of the funds of the drawer of the check in the hands of the bank to the payment of the plaintiffs' debt, as would preclude the bank from paying over to the drawer of the check the balance due him by the bank in closing up his account; the plaintiff, by his own act, refused to have the funds of the drawer on deposit in the bank appropriated for the payment of that check, conceding that the offer of payment in Confederate Treasury notes was an acceptance by the bank to pay the check in that currency. The facts of this case do not show such a *wanton* or *fraudulent* refusal of the

t to pay the holder of the check in the funds deposited by the rer thereof as would make the bank liable.
igh we think the Court erred in its charge to the jury, in relation ie question of tender, and in relation to other points involved in case, still, the verdict was right, under the law applicable to the , as disclosed by the record, and we affirm the judgment of the rt below in refusing a new trial.

ls. Acceptance. Evidence. Before Judge GIBSON. nond Superior Court. June Term, 1870.

J. Dupree brought assumpsit against the Georgia Rail- & Banking Company upon a draft in his favor by John , State Treasurer, for $4,981 95, on said company, n on the 3d of April, 1862, averring that on said day ompany accepted it, but afterwards, on the 24th of De- er, 1865, refused to pay it. There were other counts in eclaration charging the bank on deposits made and re- to repay on demand, which will sufficiently appear fter. The defense was that Jones had no funds in the but Confederate currency, which it offered to pay, but ee would not take it, and that the last presentation was Jones had closed his account, without notice to the bank said draft was out. The acceptance of the draft and the ed deposit were denied. Dupree's testimony was taken terrogatories. He afterwards died, and his administra- were made plaintiffs. On the trial those interrogatories read. He testified, that on the 18th of February, 1862, posited in said bank $10,000 00 in bank notes and va- bonds, to be invested by its cashier in bonds of the of Georgia; the deposit was forwarded to Jones, the Treasurer, who returned $5,000 00 in bonds of the and said draft, saying he could not furnish more bonds. draft covered the extra $5,000 00, less expenses. Some after April 1st, 1862, this draft "was sent to the bank for tance, and was verbally accepted." Soon after Dupree nded payment on it, and was offered Confederate money, he refused, because he had not deposited such money.

It was admitted that the funds deposited were twenty per cent. below par when deposited, and Confederate notes were then forty per cent. below par, and that gold, when purchased with Confederate currency, was at a premium of fifty per cent. on the 18th of February, 1862, and of seventy-five per cent. on the 3d of April, 1862.

For defendant, its cashier and teller were offered as witnesses. They were objected to upon the ground that they were incompetent, because Dupree was dead. The objection was overruled. They testified that from April, 1862, till the war closed, the deposits of the State Treasurer, Jones, were in Confederate Treasury notes or in paper collectable in that currency; that said draft was presented on the 10th of March, 1864, and payment in said currency was offered and he refused that currency, demanding Treasury notes of the State; they did not remember to have ever seen the draft before; never promised at any time to pay it, nor did they know that any officer of the bank ever did. Jones closed his account on the 17th of November, 1864, drawing out $25,137 22, they not knowing this draft was outstanding.

The president of the bank testified that no officer of the bank had authority to accept checks or drafts, nor was there any such usage. The letters of Dupree and the cashier were read in evidence, but they cast no great light on this issue. Dupree's private account with the bank begun in 1861, and closing, balanced, in January, 1863, was shown by a transcript from the books of the bank, and it, with his checks, were read in evidence. This transcript was objected to because the books were the best evidence, but the objection was overruled.

The Court charged the jury, and their verdict was for the defendant. The charge and refusals to charge, so far as pertinent, appear in the motion for a new trial, which was asked for upon the grounds:

1st. That the verdict was contrary to law, etc.

2d. That the Court erred in allowing the bank officers to

estify, and in allowing said transcript to be read as evi-
lence.

3d. That the Court erred in charging the jury, "That if he money was deposited in the name of, or transferred to Jones, the plaintiff has no right to recover on the original leposit. When a draft is drawn against funds deposited by he drawer, the holder is entitled to be paid only out of that kind of funds. If such money as the drawer had in bank at hat time was refused by the holder, that was a tender and lischarged the liability of the bank. The verbal acceptance f a check by the teller of the bank does not bind the bank nless authorized to do so by the directors or officers con-rolling the bank, or some regulation of the bank. If, when Mr. Dupree presented the check for payment, the proper fficer of the bank offered to pay it in Confederate Treasury otes, and he refused to receive them, it was just as if he ad said, "No, as to payment in other funds, I will go back n Jones, the drawer," and the bank had a right to expect hat he had done so, if no other steps were taken or proceed-ngs had. The holder of a check on a bank cannot sue the ank unless the check has been accepted by an officer author-ed to do so, and the authority must be specially shown. It oes not belong to the ordinary functions of any officer (un-ess proven). * * * * *
If plaintiff sent funds to defendants and directed that a cer-ificate of deposit of the amount be issued to John Jones, Treasurer, and that was done, then plaintiff has no further laim or right to sue on account of said funds so sent."

4th. That the Court erred in refusing to charge as re-quested by plaintiff's counsel, "That the holder of a check drawn on a bank where the drawer had funds, is entitled to receive the sum of money named in said check upon present-ing it for payment at the bank upon which it is drawn." But qualified the charge asked, by adding the words: "But his right to bring an action upon the check against the bank is a different question."

5th. In refusing to charge as requested by plaintiffs counsel, "That when the holder of a check on a bank presents it for payment, and is informed by the proper officer that it is good, this amounts to an acceptance of the check."

6th. In refusing to charge, as requested by plaintiff's counsel, "That when the bearer of a check drawn on a bank, where the drawer has made a general deposit of money, which has not been drawn out, and, upon presentation, the proper officer admits the fact, and offers to pay the check, but requires the bearer to take particular funds of less value than those which were deposited, this is such an acceptance as binds the bank to pay the sum named in said check in funds equal in value to those which were deposited."

The refusal in the sixth ground was because there was no evidence that Jones had a general deposit at the bank.

A new trial was refused and that is assigned as error on said grounds.

HILLIARD & KING for plaintiff's in error. In suit by administrator defendant not competent witness: Code, sec. 3798. Bank taking general deposit liable to pay good funds: Ang & A., on Corp., sec. 243; 2 Wallace S. C. R., 252; 35th Ga. R., 8. Holder entitled to sum named in check and admision of funds by teller is acceptance: Bouv. L. Dic. acceptance, 9; 4th Erst. R., 67; 10th John., 207; 5 Mass. R. 6; 3d Kent Com., 83; Byles on Bills, 79th *ante*.

W. HOPE HULL for defendant.

WARNER, J.

If the offer by the bank to pay the check in Confederate Treasury notes, on its presentation, can be considered as an acceptance thereof by the bank, it was only an acceptance to pay it in such funds as the drawer had on deposit therein at that time, which the holder of the check *refused* to receive. And if the holder of this check declines to receive in payment

thereof such funds as the drawer had on deposit in the bank until after the drawer's account with the bank was closed, there was not such an *appropriation* of the funds of the drawer by the bank to the payment of *the plaintiff's debt*, as would preclude the bank from paying over to the drawer of the check the balance due him by the bank, in closing up his account. The facts of this case, do not show such a *wanton* and *fraudulent* refusal of the bank to pay the holder of the check in the funds deposited by the drawer thereof, as will make the bank liable. Although, we think the Court below erred in its charge to the jury in relation to the question of tender, and in relation to other points in the case, still, the verdict was right under the law applicable to the facts disclosed by the record, and the motion for a new trial was properly overruled.

Let the judgment of the Court below be affirmed.

H. M. Levy *et al.*, plaintiff's in error, *vs.* Twiname & Sumner, defendant's in error.

When the property of defendant was sold under a distress-warrant for rent due, and the question before the Court was whether the proceeds of the sale in the hands of the sheriff should be paid to the holder of a prior judgment against the defendant, or to the plaintiff in the distress-warrant who claimed a lien under a contract for a lease of the premises:

Held, That the lien specified in the contract between the landlord and tenant, set forth in the record, (not being for the crop raised on the premises) did not take precedence as to payment of an older judgment lien against the defendant: Code 2260.

Priority of Lien. Rent. Before Judge Snead. City Court of Augusta. August term, 1870.

In May, 1867, George Jones *et al.*, as trustees, leased certain land to one Frain for a term of five years, in which it was stipulated that they should "have a lien upon the buildings (to be erected thereon) for any rent that may be due on

the premises." On the 4th of June, 1870, a distress-warrant in favor of the landlord was levied upon certain buildings, which had been put upon the premises by Frain. They were sold, and the proceeds were in the sheriff's hands. Then came Twiname & Sumner, who held against Frain a judgment obtained in 1869, and claimed said proceeds. After paying the costs and attorney's fees for bringing the money into Court, the balance was ordered to be paid to Twiname & Sumner. This is assigned as error.

JOSEPH P. CARR, for plaintiff in error.

MCLAWS & GANAHL, for defendants.

WARNER, J.

On the statement of facts disclosed by the record in this case, there was no error in the Court below in deciding that the lien specified in the contract between the landlord and tenant, (the same not being a lien for the crop raised on the premises,) did not take precedence, as to payment, of an older judgment lien against the defendant: Code, 2260.

Let the judgment of the Court below be affirmed.

ELI B. SANDERS, plaintiff in error, *vs.* A. B. MCAFFEE *et al.*, defendants in error.

1. Where upon the trial of claim, it appears that the claimants bought from the defendants in *fi. fa.* real estate, and the judgment was rendered before the purchase, and the claimants have been in possession over four years prior to the levy, and on this state of facts the lower Court was requested to charge the jury, "If claimants had actual notice of the judgment of plaintiff when they bought, then they were not such *bona fide* purchasers in the sense of the law, as can be protected against the judgment by a four years' possession prior to the levy," which the Court refused:

Held, That such refusal by the Court was not error, but was in conform-

ity with the decision of this Court in 39th Georgia; that the right of the plaintiff in *fi. fa.* to enforce his lien on land sold by the defendant and held in possession by a *bona fide* purchase, existed with the condition that the levy be made within four years after the commencement of the possession. LOCHRANE, C. J.

Held, That the lien of judgment does not constitute a right of property in the thing itself, but only a right to levy on it and sell it, and this under conditions and limitations of law; and while all the property of the defendant is bound from the date of the judgment, it is not such *a lien on all*, as constitutes bad faith in a purchase of part, if ample property was left in defendant's possession; such purchase may be in the strictest sense *bona fide*; for the *lien* only exists in fact upon sufficiency of defendant's estate to satisfy it, and excess in levies are trespasses under the law. LOCHRANE, C. J.

Held, That the purchaser from defendant in *fi. fa.*, for valuable consideration holds adversely, from the commencement of his possession, to the judgment creditor, and with notice to him that at the expiration of the four years his property ceases to be subject to levy, for the satisfaction of his judgment; and it requires diligence on his part to comply with the provisions of the law, in collecting his debt out of the defendant's property. LOCHRANE, C. J.

Held again, That a purchaser who buys property from a defendant in *fi. fa.* is not *per se* committing fraud; the judgment being a lien, the purchase is no fraud, for the creditor can levy on it any time to make his money, within four years. And if the purchase is not a fraud, the notice cannot make it so; for with or without notice, the lien can be enforced, within the time, by the creditor, and if the presumption of fraud is made to depend on the lapse of time, or after the four years from notice, it would be a violation of all the rules of law to authorize such presumption. LOCHRANE, C. J.

Held again, That, inasmuch as judgment creditors are neither hindered or debarred in the collection of their debts by such purchase from the defendant in *fi. fa.*, the purchase is not in any legal sense fraudulent; and when the consideration has been full and ample, in the sense of the law, the purchaser is a *bona fide* purchaser within the meaning and provisions of the Code. LOCHRANE, C. J.

Held again, That if the purchase of a part of the estate of another, upon full consideration, without any legal fraud, even though it divest the rights of creditors whose claims are not in judgment, is *bona fide*, much more will it be regarded so, as against judgment creditors whose liens are not divested, and who are neither hindered nor delayed in collecting their debts by such purchase. LOCHRANE, C. J.

Held again, That *bona fide*, as applied to purchases for valuable consideration, in the law, means such purchasers as act without *covin*, [illegible] *or collusion*, one who in the commission or connivance at no

fraud, pays full price for the property, and in good faith honestly and, in fair dealing, buys and goes into possession. And, as to such purchaser, the law will protect him in his title after the lapse of four years. LOCHRANE, C. J.

McCAY, concurring.

A *bona fide* purchaser for a valuable consideration of real property, who has remained in possession of the premises four years under his purchase, undisturbed by a judgment against the vendor, holds the property discharged from the lien of the judgment, notwithstanding he knew of the existence of the judgment at the time of the purchase.

WARNER, J., dissenting. Four years possession of land by one having actual notice of a judgment lien thereon, does not defeat such lien. (R.)

Claim. Lien. *Bona fides.* Before Judge HARRELL. Randolph Superior Court. May Term, 1870.

The other cause of Sanders *vs.* McAffee & Owen, at this term, was an effort to defeat a vendor's lien against certain land therein mentioned. Besides this they were endeavoring to collect their said *fi. fa.* by a levy on the land. The judgment was dated the 4th November, 1863, in favor of Sanders *vs.* S. W. Anthony, and the *fi. fa.* issued upon it was levied upon said land in December, 1868. McAffee & Owens claimed the land. On the trial of the claim, the plaintiff read in evidence the *fi. fa.*, proved that S. W. Anthony was in possession of the land in December, 1863, and closed.

For the claimants it was admitted that they bought the land from defendants in *fi. fa.* on the 8th of January, 1864, paid the purchase-money, took titles from said defendants in *fi. fa.* and had occupied the land from thence to the time of the trial. The other evidence was as is set forth in the cause of Sanders *vs.* McAffee & Owens.

Plaintiff's counsel asked the Court to charge the jury that "if claimants had actual notice of plaintiff's judgment when they bought, then they were not such *bona fide* purchasers, in the sense of the law, as can be protected against the judgment by a four years' possession prior to the levy." He refused so to charge, but charged that "if claimants had *bona*

fide and for a valuable consideration bought said land, and had been in possession thereof for four years before the levy of the *fi. fa.*, the lien of the judgment was discharged, otherwise, not." The jury found the property not subject. The refusal to charge is assigned as error, and the verdict is said to be strongly and decidedly against the weight of the evidence.

JOHN T. CLARK, for plaintiff in error, said *bona fide* negatived the idea of notice of the lien, and as to meaning of *bona fide* cited Act of December, 19th, 1822; Cobb's N. Digest, 496, 497; 7th Ga. R.. 166; 14th, 157–8; 3d, 448; 25th, 58; 27th, 641, 642, 644; 29th, 488; 34th, 385, 454; Add. on Con., Mar., p. 215 to 219, inclusive, also 262; Story on Promissory Notes, sections 191, 192, and Note 2; Irwin's Code, sections 2743, 2745, 2597, 2598, 2608, 2851, 2855, 2323, 2328; 38th, 18; 39th, 342, 347, 421. Notice was proved: Evidence and 14th Ga. R., 157–8–9.

H. FIELDER, for defendant.

LOCHRANE, C. J.

1. This case comes before the Court upon error assigned on the refusal of the Court below to charge the jury: "If claimants had actual notice of the judgment of the plaintiff, when they brought the land in controversy, then they were not such *bona fide* purchasers, in the sense of the law, as can be protected against the judgment by a four years' possession prior to the levy." This the Court refused, and charged the jury: "If claimants had, *bona fide*, and for a valuable consideration, bought said lands and had been in possession thereof for four years before the levy of the *fi. fa.*, the lien of the judgment was discharged, otherwise, not." The jury found the property not subject.

Section 3525 of the Revised Code is in the words charged by the Court below, as applicable to this case, and the naked

question before us is, whether a purchaser, for a valuable consideration and in possession of the property for four years, if he had actual notice of a judgment existing against the vendor at the time of the purchase, can he be held, in law, to be a *bona fide* purchaser, and within the provisions and protection of the Code. In *Chapman vs. Akin*, 39 Georgia, 347, this Court held, in construing this section, that it ran in favor of a *bona fide* purchaser, and was not suspended by the Acts suspending the Statute of Limitations, and the right, whatever it may be, of the plaintiff in *fi. fa.* to enforce his liens on land sold by the defendant and held in possession by a *bona fide* purchaser, existed, with the condition annexed, that the levy be made within four years after the commencement of the possession; and, as the plaintiff made no such levy, he lost his lien by failure to enforce it, in accordance with the condition to which it was subject and with which he never complied."

This decision disposes of the question in this case, except so far as the necessity invoked by the request involves the opinion of this Court on the meaning of the term *bona fide*, in the connection in which it stands in this section. It will be remarked that the judgment of this Court, in 39 Georgia Reports, places no qualifying words to the term *bona fide*, and Chief Justice BROWN, in delivering the opinion, does not interpolate with the law the words "actual notice" as definitive of the term. He simply states, by way of recital, that there was no pretense of actual notice of the judgments being had by the claimants in that case. We, therefore, proceed to adjudge the question as to whether the term *bona fide* in the Code, and used by this Court, without definition as stated, means such purchaser as had no actual notice of the judgment at the time of the purchase.

The request presented the theory of the law held and ably argued in this case by counsel for plaintiff in error. There is no admixture of terms and principles; the request is open and plain. "If claimants had actual notice of the judgment

of the plaintiff when they bought, then they were not such *bona fide* purchasers, in the sense of the law, as can be protected against the judgment by a four years' possession prior to the levy." This is the plain proposition which was requested, and the refusal to charge which is assigned as error. We do not think the Court erred in refusing to give this request to the jury, under the facts of this case.

2. It is contended that all the property of the defendant is bound for the judgment. Such is the law, by the Judiciary Act of 1799, and by the Code. But how bound? Is it a property right in the plaintiff covering all the defendant's estate, which makes any person purchasing a part guilty of committing fraud on his rights? We think not. The lien of a judgment does not constitute a right of property, in the thing itself, but only a right to levy on it and sell it: 4 Florida, 126. And even this right is limited, and excessive levies are trespasses, in the law.

Lien of judgment is general and not specific, and gives no property in the thing: 27 Miss.; 5 Cush., 679. And the limitation upon their enforcement is governed by the amount of the lien. Again, this lien is not only limited as to how much it shall be levied on, but as to the class and kind of property—first, that in the possession of the defendant. Again, if the property has been sold by levy of the junior judgment, the older can only come in and claim the money: 8 Gratt., 179; 9 Georgia, 164. That a judgment creditor, having waived his right to subject the property first liable, cannot go on the next, is a proposition held in 8th Gratt, 179, above quoted; showing that the rule is too broadly stated, if intended to mean that all a man's property is incumbered with the judgment lien against the owner, and that it is fraud for him to sell any of it, and fraud to buy any from him. This is not the meaning of the law; for neither law nor equity, even on a debt reduced to judgment and suspended from levy by appeal, will restrain a sale of a part where enough is left to meet the judgment. The meaning, "all the

property is bound from the judgment" means all necessary to pay it, for the lien is only for so much, and can be levied on no more.

This Court has laid down analogous doctrine in the case of *Scott vs. Winship*, 20th Georgia, 429, in holding: "The rule that the sale of the whole of one's property is a badge of fraud, does not apply where a small part is sold;" thus recognizing the principle that the purchase of a part of the property of the defendant in *fi. fa.*, where he has ample property left to discharge the judgment lien is no fraud upon the judgment creditor, and is, therefore, *bona fide* upon the part of both the seller and buyer. In the enforcement of the judgment lien we have thus far shown the limitations of the law, not controverting the general principle that judgments bind all the property of the defendant, as laid down in 19th Georgia, 452.

3. But as to the reasonable construction of such a general rule, and to show that the lien has a right to be enforced by levy and sale on sufficiency of the property to satisfy it, and not an estate in the property of the defendant in *fi. fa.*, that it is a right, the enforcement of which is upon condition that it shall be asserted within four years, upon any property aliened after its existence, if necessary to levy on such property to satisfy its demand. This is the opinion of the Court, and consequently notice of its existence does not change the rule. The purchaser, *bona fide* and for valuable consideration, from the hour he goes into possession, is holding adversely to the judgment creditor as to the property he has bought from the defendant in *fi. fa.*, with notice to him that, at the expiration of the four years, his property ceases to be subject to levy for the satisfaction of his judgment; and if the creditor does not move within this time to collect from the defendant in *fi. fa.*, he loses his lien upon the estate so held adversely to his right: provided that he is a *bona fide* purchaser for valuable consideration; and, in the opinion we entertain of the law, he may be a *bona fide* purchaser with notice of the judgment and

except there be *fraud* in his purchase, he will be protected upon his four years' possession.

4. A purchaser who buys property from a party against whom there is an outstanding judgment is not, *per se*, committing fraud, if he pays full price. The Act of 1822 contained the words *actual notice;* this section of the Code does not. It simply says a *bona fide* purchaser. What fraud can such purchaser be supposed to inflict on a judgment creditor? If the judgment is a lien, the purchase is not a fraud, for the creditor can levy on it any time within four years to make his money. Notice cannot in such case make it a fraud. The party buys, taking the risk of the enforcement of the lien, but that risk expires by law in four years. If the creditor permits the time to lapse, it is his own fault and ought not to be attributed to fraud in the purchaser; it abridges no right of the creditor; for if the defendant in *fi. fa.* has not sufficient property to meet the claim, the lien for four years extends to that which has been purchased. In *Peck vs. Land*, 2 Kelly 1st, it is held "that a sale of property for full price with a view to hinder creditors, is fraudulent." But the purchaser must have knowledge of, and participate in the design. Now, in cases where creditors have judgment on the real estate they are neither hindered nor delayed, and it can work no injury to them, except it may consist in the purpose that the purchaser prefers the defendant in *fi. fa.* to have four years opportunity to work his own property, and then at the end have to pay his debts; for the presumption of such fraud is in the limitation of the time from seven to four years. Can we presume fraud in a purchaser of a part of the estate for full price upon the presumption that the creditor will wait four years on the defendant in *fi. fa.*, and then this fraud is to be perpetrated to his own injury?

5. We have just shown that the purchase of a part is not a badge of fraud. The case in 20*th Georgia*, 437, goes further, in holding the Judge erred in refusing to charge the jury that, if they believed claimant paid a valuable considera-

tion for the negroes levied on, this rebuts the presumption of fraud," not only arising from the purchase but even where the continued possession of the property remained in the party. "Will it be pretended," said the Chief Justice, LUMPKIN, "that if Mrs. S. paid to her son a valuable consideration for the property in dispute, her permitting it to remain with her son would subject it to antecedent and pre-existing debts? That her son may have attempted to run off the property, with a view to cheat either his mother's creditors, or both, is quite possible; but unless his mother knew of it and connived at it, it cannot prejudice her title or cast suspicion upon the *bona fides* of the sale from her son to her." This language is strong, and bears the impress of feeling in the enumeration of the principles it decides. There is neither doubt nor uncertainty in the conclusion; and a *bona fide* purchaser is presented, under the rule, as one who has paid valuable consideration for the thing purchased and, applied to this case, under the lapse of time, has acquired a perfect title, free from all incumbrance of lien.

6. And this very idea prevailing in Judge LUMPKIN's mind, in delivering this opinion, as a sentiment of justice, is drawn from the highest authorities of the law, and may be found in the decision of Lord Romilley, M. R., in the Law Reports, Equity Cases, volume 3d, and by Lord Chelmsford, L. C., in the case of Howard vs. the Earl of Shrewsbury. Where valuable consideration is paid for property, and there is no intent to defraud, the purchase is held *bona fide*. If we go up the stream of authorities to the fountain, we find in the thirteenth year of the reign of Queen Elizabeth, 1570, or over three hundred years ago, estates upon good consideration and *bona fide*, were held to be valid. See section VI. of the Act.

7. And the facts which negative the *bona fides* of the transaction are enumerated as notice or knowledge of "covin, fraud or collusion," in the terms of the Act. The principles of this statute have crept into all the legislation

judicial expositions of the law since. Notice enters into ingredients that may, in proper cases, apply to fraud, e the intrinsic unfairness of the transaction arising inadequacy of price or misrepresentation, or suppres- of facts known, or when the evidence attending the is apparently inconsistent with honest purpose or fair ng, or many other causes or cases that might be recited. e showing participation, connivance, covin, fraud or sion, would properly go to the jury for their considera- —and this upon the settled and established principles w found in all the books. But in all questions of good , adequacy of price, from first to last, is an unquestioned nce of the *bona fides*. In some cases it is not sufficient, n all cases it is regarded with the very highest conside- n. When a party purchases and pays full price, it is *alus dolus* as to creditors existing at the time, except purchase is made to hinder or delay creditors, and the haser participates in the intent, or is in violation of rule against preference to creditors, should the pur- r be also a creditor. And if inadequacy of considera- is not *mala fides* as to creditors generally, upon what iple does the fact that the debts are in judgment change rule? The reason gathers strength applied to creditors are divested of all rights to levy or collect their debts, dwindles into evanescent diminution applied to those are neither hindered nor delayed, and cannot be injured s they voluntarily delay collecting their debts for over years. All the reason and logic of the law illustrates ontrary.

reverse the proposition. A party buys an estate from ner who has large means to meet the judgment existing. pays full price, goes into possession and improves it. plaintiff in *fi. fa.* indulges the creditor by an entry seven years. The lien continues. The creditor sees defendant wasting his estate day by day; and, finally it is all gone, he demands payment from the *bona fide*

purchaser for valuable consideration. Would it not be fraud in the author of the proposition? We have examined the various sections of the Code, the authorities, as far as we could in the short time allowed us, and after a full review and analysis of the principles applicable to this case, and with what seems conflicting in the opinion of my learned predecessor in 39th Georgia, I am clearly of opinion that the term *bona fide* in section 3525 of the Revised Code of this State, means one who, in the commission or participation of no fraud, pays a full price for property which he continuously and openly holds in possession for four years after the sale, and that his actual notice of an existing judgment against the vendor at the time of his purchase is not sufficient, *per se*, to charge him with fraud so as to render his title impotent for his protection, when he otherwise stands within the provisions of the law.

Judgment affirmed.

McCAY, J., concurring.

When this question was first presented I was strongly inclined to the opinion that by the words "*bona fide*" in this section of the Code, we must understand, not only "really" and "honestly," but without notice of the judgment. I was led to this by the consideration that equity will not permit one who buys with notice of an incumbrance, to hold the estate free from it. No man can be said to act *bona fide* who knowing of a lien, seeks to take advantage of the incumbrance by getting the legal title. It is a species of fraud, an attempt to get property from one who the buyer knows has not, in good conscience, the right to sell it.

But upon further reflection, I am satisfied that the equitable doctrine I have referred to has no application to the case provided for by this section of the Code. The words *bona fide*, as here used, must be taken in their ordinary signification, and to interpolate into the language used, the words "without notice," is a violation of the spirit and

meaning of the law. If it were provided that a *bona fide* purchaser of property under a judgment lien should take it *free from the lien*, if a *bona fide* purchaser for value acquired by his purchase an unincumbered title to the property, then the words *bona fide* might be fairly understood to include within their meaning "without notice;" since it would be grossly unjust, and would be aiding in a fraud to permit a purchaser with full notice of a judgment to buy free from its lien. But this section of the Code makes no such provision. By our law, a purchaser, with or without actual notice, takes nothing by his purchase as against any judgment liens upon the property. He always buys subject to such liens, whether he knows of them or not. The law presumes notice from the record, and it is absurd to say that a purchaser of such property is not *bona fide* unless he buys without actual notice, since, so far as the judgment creditor's right to sell the property is concerned, it is wholly immaterial whether the purchaser is without actual notice or not. The holder of the judgment has the same right to levy and sell as before, even if the purchaser be wholly ignorant of the lien. Indeed, to interpolate the words "without notice" into this section of the Code, as explanatory of the words *bona fide*, is to make the statute wholly nugatory; since in *this* sense of the words *bona fide* there *can* be no such a purchaser of property subject to a judgment lien. The law presumes notice, and it is, by the equitable rule we have alluded to, just as much *mala fides* to buy without inquiring at the record office as to buy with actual notice. The object of this section is not to alter in the least the right of the judgment creditor; his lien is as good as ever it was. The purchaser has not hurt him, and there can, therefore, be no *mala fides* as to the judgment creditor in the matter. Notice of the judgment has, therefore, nothing to do with it, one way or the other, unless, perhaps, it may be used as evidence, to give color to other acts, and

show that the purchase was a sham or not a purchase at all, of the entire property.

The only effect of this section of the Code upon the creditor is not to alter in the least his right of lien, but to say to him, if the debtor, really, *bona fide*, sell the property for a valuable consideration, and the purchaser *takes possession*, you must assert your lien within four years, or lose your lien. You shall not stand by, knowing that one has really bought the property, (and his possession is full notice) and wait until the seller has become insolvent, and the purchaser has no means of indemnifying himself, and then assert your lien.

The object of the section is not to prevent the fraudulent purchase of property subject to judgments, (that cannot be done in this State) but to prevent the holders of judgment liens from using them to defraud third persons. Indeed, that was in substance the declared intent of the Act of 1822, for which this section is a substitute; and the object of the Act is the key to the meaning of these words. The purchase must be *bona fide*. It must be real, not a sham. It must be a purchase of the whole. The buyer must think he is getting the estate without any real drawback. It must be a purchase of the property entire, and not a purchase avowedly with the burden of the lien to follow it The purchaser, too, must take possession, let the world know that a claim adverse to that of the defendant is set up. Unless this be done the lien of the judgment continues indefinitely, as though there had been no sale.

It is a matter of common observation, that this sort of purchases are an every day occurrence. Defendants in judgments are often persons of large means; and nothing is more common than to buy property knowing that there are judgments against the defendants, and yet, with the utmost good faith, to pay a full price, without any thought of the judgment. As it is a general lien in this State upon all the property, real and personal, wherever found, of the defendant,

one feels that, if he leave abundance in the hands of defendant to pay the judgments, he may safely buy; and men do this, as we all know by every day's observation, without the least fear, and without a thought of *mala fides* as to the judgment creditor.

It is significant, too, that in this section the words "*bona fide*" only are used, while it is almost invariably true that he Codifiers, when they mean to make notice an element in he matter, are careful to add to the words *bona fide* the ther words and, "without notice," (see sections 1765, 1768, 942, 1949, 2228, 2303, 2323, 2590, 2548, 2589, 2608, 2620, 697, 2743, 3037, 3064.) Whilst there are, so far as I have bserved, but two instances in which they have used the ords in the sense which includes "without notice," to-wit: 597, 2748; and both these sections refer to negotiable securities, in reference to which the words "*bona fide*" has acuired a *technical* signification by common usage.

WARNER, J., dissenting.

On the trial of a claim case, the claimants relied on four ears possession of the land as *bona fide* purchasers thereof, and he following evidence was introduced, as to the actual notice of he claimant of the existence of the plaintiff's judgment, at the ime of the purchase: Owens, one of the claimants, testified, 'that when the deeds were about being made and the trade losed up in the office of Stewart, an attorney-at-law, witness sked S. W. Anthony, whether or not there were any *liens* n the land, and Stewart replied that there were none, except ne, in Randolph Court, and one in Clay Court, that he was he attorney who had *sued out both claims*." Goneke testiied, that "some time prior to the purchase of the land, in answer to inquiries made of him by the claimants in relation o the same, he told them, that Sanders, the plaintiff, had sold o Dr. Anthony the land; that the debt or a large portion of hem then standing open and in suit, or judgment; cannot

now say that I then knew of Sanders' judgment; I knew of the debt, knew for what it was contracted, and knew it was sued, and may have known that it was in judgment; they sought information from me, and was careful in my statement, desired to communicate all that I knew, so that they might not be deceived." Rev. Samuel Anthony testified, that he was present in Stewart's office, when the claimants and Dr. S. W. Anthony met there to close the land trade. Owens inquired if there were any *incumbrances* on the property. Dr. Anthony replied, "None, except the claim of Sanders, of which I told you, and which Mr. Stewart knows all about." Stewart remarked, that there was nothing against the land, except the claim of Sanders, which was in his hands for collection, and further said, if the Sanders claim should ever come against the land, he, Stewart, would be responsible for it. The execution levied on the land, issued on a judgment obtained in the Superior Court of Randolph county, in favor of Sanders against the Anthonys. The counsel for the plaintiff requested the Court, in writing, to charge the jury "if claimants had actual notice of the judgment of plaintiff when they bought, then they were not such *bona fide* purchasers, in the sense of the law, as can be protected against the judgment by a four years possession prior to the levy," which charge the Court declined to give, but did charge the jury, that "if claimants had *bona fide* and for a valuable consideration bought said land, and had been in possession thereof, for four years before the levy of the *fi. fa.*, the lien of the judgment was discharged, otherwise not." The charge contained in the request of the plaintiff's counsel was a pertinent, legal charge, in view of the evidence in the record as to actual notice of Sanders' judgment at the time of the purchase of the land by the claimants, and the Court erred in not charging the jury as requested. The question of *notice* was a question of fact for the jury to decide from the evidence in the case. If the claimants did have *actual notice* of the plaintiff's judgment at the time of the purchase of the land,

they were not *bona fide* purchasers thereof, within the ntent and meaning of the 3525th section of the Code, he evidence in the record in relation to that fact was sufficient to have authorized the charge of the Court uested.

ORN ANDERSON, plaintiff in error, *vs.* JAMES SUGGS, defendant in error.

in an action of ejectment for land, the controversy is about the ing line, and the plaintiff shows title in himself to the lot, but , chain of title from the State, and the defendant claims through ed from plaintiff, and evidence is introduced to prove the acqui- ce of the defendant in the boundary asserted by plaintiff, and such ss discloses by his evidence the existence of such deed, and a on made to rule out the evidence relative to the contents of the , was overruled and the plaintiff closed his case, and the jury d for the plaintiff with *mesne* profits:

That the plaintiff had not shown such title as would allow him to ver on the deeds, his evidence being no chain of title from the to him.

urther, That while evidence of acquiescence in the boundary un he facts, in this case was competent evidence, it was not compe to go into the contents of the deed, and on the fact of the exi s of such deed from plaintiff to defendant being shown, it was th e of the Court to stop the testimony until the parties, one or th e r claiming under such deed, produced it. And as a question o f tice, he who claims any right or benefit arising under any instru in writing is the party whose duty it is to present it to the Court put it in evidence.

illegal testimony has been improperly admitted by the Court, an d plaintiff has not made out such a case as entitles him to recover his titles:

That the refusal to grant a new trial is error.

al evidence comes in without objection it should be ruled out upon tion afterwards made for that purpose. (R.)

ejectment. New Trial. Before Judge HARRELL. Quit- Superior Court. May Term, 1870.

Anderson *vs.* Suggs.

Suggs brought ejectment against Anderson for part of land lot number sixty-eight, in said county, to-wit: forty acres of it on the north side of a certain branch. A witness, introduced by plaintiff, testified, that Anderson told him that he bought of Suggs a part of said lot, and put him in possession; that he had seen the deed from Suggs to Anderson to part of said lot; that Anderson told him he paid Suggs for the part south of the branch, but that he had ascertained that the part south of the branch was not half the lot; that Anderson got an order of Court for a division of the land; that he got the County Surveyor, and gave notice to the parties, and that the Surveyor, in dividing the lot into equal parts, ran south of the line, north of the branch, and that Suggs, since this suit was brought, sold the north half of said lot, and his purchaser had taken possession and claimed only down to the line run by the Surveyor, and recognized that as the correct line; that in 1862, Anderson went north of the branch and cleared about twenty acres north of the branch, but south of said line run by the Surveyor.

Counsel moved to rule out this evidence, because it appeared that there was a deed, which was the best evidence of what was conveyed by Suggs to Anderson. The motion was overruled.

Plaintiff's counsel then read in evidence the following deeds: one made the 11th of November, 1850, from James F. Newsom to Suggs; one made the ..... day of January, 1850, from James Cooper to said Newsom; one from John Cooper to James Cooper, made the 18th of May; 1850; another, from Evan Rice to John Cooper, made the 10th of April, 1849, each of which conveyed that part of number sixty-eight lying north of said branch; a deed from Leonard Cooper to James F. Newsom, made the 6th of January, 1847, conveying numbers sixty-two, sixty-seven and part of sixty-eight, south of a branch therein. The jury found for the plaintiff. Defendant moved for a new trial, because the Court refused to rule out said testimony, and because the ver-

dict is not supported by the evidence, etc. The new trial was refused, and that is assigned as error.

E. L. DOUGLASS. B. S. WORRILL, for plaintiff in error.

A. HOOD, for defendant.

LOCHRANE, C. J.

This case presents a controversy about the dividing line f a lot of land which Suggs had sold to Anderson. Upon the rial below, it appeared that Suggs was the owner of lot of and number sixty-eight, in the Eighth District of Quitman ounty, and that he had sold to Anderson a part of that lot. t further appears, that the lot was divided by a stream called Big Branch. The part of the lot sold to Anderson, Suggs laimed to be south of this branch. In 1862, however, Anerson went over the branch, on the north side, clearing some wenty acres, for which twenty acres, this suit in ejectment ras instituted. On the trial, Suggs introduced Abraham hields as a witness, who testified as to the sayings of Anerson, relative to his acquiescence in the Big Branch as the ividing line. Shields also stated that he had seen the deed uggs made to Anderson, and also some action by the Coun- y Surveyor in running the lines. Several deeds were intro- luced from various parties for the whole lot to Suggs in hich it appeared, that the part south of the branch had een deeded as that part of lot sixty-eight, lying south side f the branch; and in the other deed, for the north part, nown and distinguished as the "north part of the lot sixty- ight, or all that part lying north of Big Branch." These itles by their terms recognize the branch as the dividing line. The plaintiff closed, showing title in himself to the whole ot, but not a chain of title from the State. Defendant in- roduced no evidence. The jury found for the plaintiff with ents profits.

1. The first assignment of error, is upon the admission of

the testimony of Abraham Shields. It appears from the bill of exceptions, the counsel for defendant moved to rule out the testimony of Abraham Shields, upon the ground that he could not give in evidence the contents of the deed. The Court overruled this motion. In this, we think the Court was in error. It was competent for Abraham Shields to have proved the sayings of Anderson while in possession as to his assent to, or acquiescence in Big Branch as the dividing line; but it was not competent for him to go into the contents of a deed. And, as soon as it was disclosed by his evidence to the Court that there was a deed from Suggs to Anderson, it was the duty of the Court to have stopped the testimony, and compelled the parties, one or the other, claiming under such deed, to have introduced it.

A question of practice in this particular, has been argued before us, and we lay down the rule, that he who claims any right or benefit, arising under any instrument in writing, is the party whose duty it is to present it to the Court, and put it in evidence; and this rule is not changed by the fact that the instrument is in the possession of the adverse party. As to the oral evidence in relation to the order of the Court and the action of the Surveyor, we hold that as to such testimony, whether it was objected to at the time of its admission or not, it was the duty of the Court to have ruled it out when that motion was made before it. And inasmuch as Suggs was not entitled to recover upon the title presented, the whole lot in dispute and the testimony of Shields was improperly admitted, we hold the Court erred in refusing to grant a motion for a new trial.

Judgment reversed.

Clark *vs.* Feagan.

JOHN T. CLARK, assignee, plaintiff in error, *vs.* H. G. FEAGAN, sheriff, defendant in error.

A return by the sheriff upon a *fi. fa.*, that he has "received of the defendant $9 25, in full of the costs on this *fi. fa.*, is such a return or entry as, under section 2863 of the Revised Code, will prevent the dormancy of the judgment.

Relief. Dormancy of Judgments. Before Judge HARRELL. Stewart Superior Court. October Term, 1870.

On the 14th of December, 1853, Blanford & Brown obtained a *fi. fa.* on their judgment against one Evans. They transferred this *fi. fa.* to James Clark, and he to John T. Clark on the 17th of March, 1859. On the 3d of March, 1860, on the 5th of January, 1863, and on the 20th of December, 1865, different payments were made to Clark and receipted for on the *fi. fa.* It had on it another receipt, as follows: "Received of C. A. Evans, $9 25-100, in full of costs on this *fi. fa.*, February 21, 1861. George W. Kidd, D. S." On the 27th of November, 1867, it was levied upon certain land. The sheriff, having failed to make the money on it, was ruled at April Term, 1869. When the cause came on for hearing the sheriff rested alone upon the facts that this was a debt due prior to June, 1865, and that, as he was advised, said *fi. fa.* was dormant. The Court discharged the rule upon the grounds that the *fi. fa.* was dormant, and that a rule did not lay for the refusal to execute a *fi. fa.* founded upon a debt dueprior to June, 1865. This is assigned as error.

JOHN T. CLARK, for plaintiff in error, said the judgment was not dormant, the payment of costs kept it alive: 2 Kelly, 253; 7th Ga. R., 187; 17th, 187; 18th, 746; 24th, 445; 25th, 274; 39th, 354–5; 413, 419; Acts 1856; Code, sec. 2855; as to enforcing *fi. fa.*: Code, sec. 3873; 34th Ga. R., 309.

E. H. BEALL, for defendant.

McCay, J.

We see no reason why a return by the sheriff that he has collected the costs on a *fi. fa.* is not a return, in the sense of that word as used in section 2863 of the Code. It is surely an "entry" by the officer authorized "to execute and return" the *fi. fa.;* and it is a reply to the mandate of the writ. It is a proper return for the sheriff to make. It would be evidence as an official return.

That the costs are not due to the plaintiff, but to the officers of the Court, does not, as it seems to us, affect the question. The judgment for the plaintiff is for the costs, and he is charged with collecting them; they are received and collected in his name.

As we said in the case of *Battle vs. Shivers, 39th Georgia,* 405, this entry is to go on the docket, and to be notice that, at its date, there was a subsisting judgment.

The law does not require that some *action* be taken by the plaintiff, but that there shall be a *return*—an *entry*. This may be a statement by the officer that the plaintiff has actually dismissed a levy, refused to act.

The very words, as well as the spirit of the law, have been complied with, and we think the judgment was not dormant.

Judgment reversed.

Gray, Bedell & Hughes plaintiffs in error, *vs.* John H. Bass, defendant in error.

1. A count on an implied contract, may be joined with one on a special contract, and that too by amendment.
2. The verdict of the jury being supported by evidence will not be disturbed, inasmuch as the matter of whether the factor had made such special contract, was a question of fact for the jury to decide, upon the whole evidence submitted to them.

he question of ratification was one which was based on the intention the parties, and was a matter of evidence properly submitted to the y.

The amount of damage in this case depended on the view the jury ok from the evidence of the contract itself; and the finding of the y in this case being sustained by the evidence as to the amount of mage, taking the value at the time they held the owner would have d his cotton sold, and allowing expenses, etc., will not be set aside— ing supported by the evidence.

leading. Factors. New Trial. Before Judge JOHN-. Muscogee Superior Court. May Term, 1870.

o much of this case as does not appear in the motion for trial, as set forth, is as follows: Bass averred that Gray, ell & Hughes, Factors and Commission Merchants, at umbus, Georgia, on the 4th day of January, 1868, receiv- rom him one hundred and ten bales of cotton, weighing -seven thousand four hundred and seventy-three pounds, th $12,000 00, drew a draft against it for certain ad- ces, at sixty days after date, and, in consideration of their missions, etc., agreed to ship the same to Liverpool for s, and that it should not be sold before the maturity of said t; and yet, by failing to advise their agents of the contract, allowed it to be sold, *in transitu*, and before said draft ured, damaging Bass $5,000 00. In another count, by ndment, he averred that the cotton weighed sixty thou- l five hundred pounds and that the contract was, that it to be sent to Liverpool and not sold till sixty days af- its shipment from the port of Savannah, and yet they dulently sold it on the 27th of January, 1868, to arrive Liverpool, on the basis of six and seven-eighths pence per nd; whereas, had it been sold as late as, by the contract, ould have been, it would have brough fifteen pence per nd. This was demurred to, because of an improper join- of counts, but the demurrer was overruled.

The defendants pleaded that in April, 1868, Bass accepted ll of exchange on Blissey, Brown & Company of Liverpool, £505 6s. 7d., in full satisfaction of said promises and un-

dertakings, and further as appears in the motion for new trial. On the trial, Bass testified that defendants had his said cotton, weighing fifty-nine thousand seven hundred and fourteen pounds, being good middlings, and he wished $40 00 per bale advanced upon it if he shipped it to Liverpool. Defendants wished to ship it to Liverpool and said they would arrange for such advance at sixty days, without interest during the sixty days, and with the Liverpool rate after sixty days. They said Bass could hold it as long as he pleased after the maturity of the draft. Bass expressed suspicion of Liverpool houses, to which they replied there was no danger, that they would ship to Brown, Chipley & Company, or Strother & Company. Bass told them to ship his to either of said houses. Next day, before the cotton was put out of the warehouse, Bass told Gray, with whom he had been treating as aforesaid, that he would fix a day in the Spring, after the maturity of said draft, on which the cotton should be sold, without regard to its value, because he feared to give any discretion as to the time of selling said cotton. He said if no such positive instructions were given and cotton advanced, his would be reported as sold at the lowest price, and insisted on sending such instructions with the cotton. Gray said such a course was not commercial, that Liverpool could be reached by mail in ten or twelve days and by telegram at once, and direction could be given as wished. On the 28th of January, 1868, Gray advised him that his cotton had been sold to arrive, and Bass at once urged them to telegraph reciniding the sale or that they substitute other cotton for his. No one ever offered to make such substitution. (The Court held that evidence of offer to replace the cotton was admissible only so far as it tended to show Bass' acquiescence in said sale.) He never consented to, or ratified said sale. Defendants would not sign such a receipt as Bass wished, because they would not impliedly acknowledge themselves liable to him for loss, nor would he pay upon their receipted bill lest he should release them. Bass then proposed to pay upon their receipting for so much

money paid, leaving the matter of liability open. All that Bass ever received on account of said cotton was $5,000 00.

Upon cross-examination, he said, when he received the account of sales, and the draft of £505 7s. 6d., he made no objections to the sales, but had always expressed his dissatisfaction. About a week after, he paid them $1,500 00 balance due as per their account, because he had been trusted by them with the draft and because he was advised to pay it and make his claim against them. Bass never paid the revenue tax or any expense on said cotton, he received $4,391 25, and the bill of exchange in March, 1869, of which the net value in currency was over $3,317 92. The receipt was read in evidence as follows: "Columbus, 6th April, 1868, received of John H. Bass, fifteen hundred and thirty 59-100 dollars on account, Gray, Bedell & Hughes." Plaintiff read in evidence a letter of defendant's dated 28th (18th) January, 1868, stating "We are advised to-day of the sale of your cotton to arrive, at 7¼d. in Liverpool." A witness testified that the cotton was worth in Liverpool as follows: On the 8th of February 1869, 8⅝d., equal to $14,306 46; on the 28th of February, 1869, 9⅜d., equal to $15,550 50; on the 1st of May, 1869, 12⅝d., equal to $20,941 35. Another witness put the prices as follows for middlings in Liverpool: 10th January, 1869, 7⅛d.; 13th February, 8⅝d.; 28th February, 9⅜d.; 13th March, 10⅛d.; 27th March, 10⅛d.; 17th April, 12⅛d.; 1st May, 12⅝d.; 15th May, 12d.; 29th May, 11¼d.; 12th June, 11d.; and said that ordinary cotton was worth about 1d. less, at said respective dates, than middlings.

Plaintiff read the interrogatories of one Starr, who said his firm received said cotton at Savannah, on the 27th of December, 1867, said to be Bass', and for shipment to Liverpool; that on the 2d of January, 1868, it was shipped from Savannah, consigned to Blissey, Brown & Company, Liverpool. On the 28th of December, 1867, Wilder & Fullarton, business friends of Starr & Roberts, drew a draft against this cotton for a sum equal to $5,616 85 on said consignees, and pay-

able in sixty days. No special instructions as to the disposition of said cotton were given; it was to be fully advanced upon and take the usual course. On the 16th of December, 1867, Starr & Roberts received a telegram, saying they had one hundred and eighteen bales of cotton, and wished $5,000 00 advanced upon it. Starr & Roberts negotiated with Wilder & Fullarton for the $5,000 00, and sent it the next day; the money was raised on the draft last mentioned, though the draft was not drawn till the cotton arrived. About the 18th of January, 1868, the cotton was sold at 7¼d. for middling, valued at 6⅞d. when it arrived. Starr & Roberts, on 18th January, 1868, advised defendants, and on 20th January, 1868, they replied that Bass was dissatisfied, because the sale was made to arrive. On 27th January, 1868, Starr & Roberts offered to have the cotton replaced and hold it, and he thought he wrote thus to Bass as well as to defendants; no response was made to this; the cotton could then have been replaced at the same or a little higher figure; it was, at the date of sale at Liverpool, worth 7⅞d. It arrived in Liverpool between the 10th and 14th of February, 1868, and was then and there worth 8½d.

For the defense, Gray testified that no instructions as to the sale of the cotton were given by Bass, but that several days after he had made the advance, which they procured from Starr & Roberts, Bass asked when it would be sold, and Gray replied that it would arrive about the maturity of the draft, and would be sold on arrival to meet the draft, as was usual. Nothing more was said until Bass complained at such sale. Defendants were as much surprised by such sale as Bass, and wrote Starr & Roberts to replace the cotton; they offered to do so, saying they could at a less price than the said selling price, but Bass declined; he saw all the correspondence as it occurred. Cotton declined steadily for several weeks, and Bass made no demand on defendants nor expressed further dissatisfaction till it began going up. In about four or six weeks defendants received

from said consignees an account of sale, with a letter to them from Bass. By defendants' books Bass was then in their debt $1,530 00, and the balance due on consignee's account of sales was £505 6s. 7d., and defendants drew a draft for that amount and handed it to Bass; he then made not the slightest objection to said sale. About a week after, he came to pay the $1,530 00 and wished a receipt, admitting that the cotton transaction was open; defendants refused to sign such receipt, and gave the one in evidence. He said that defendants got nothing but storage and usual commissions for forwarding; all other expenses were paid by parties who handled it after it left defendants. (These are stated, but parts of them are illegible.) Hughes testified that in the latter part of January, 1868, he was passing as Bass & Gray were talking of this sale, and heard Bass say, "No, let the d—d thing go," and that he heard no more complaint till the $1,530 00 was paid.

Bass, recalled, said Starr & Roberts did propose to him to buy other cotton, and offering to advance on it, but said he replied that he had had enough of them.

The jury found for plaintiff for $3,831 76, with interest from the 1st of April, 1870. Defendants moved for a new trial upon the following grounds:

1st. Because the Court overruled the demurrer of defendants to plaintiff's declaration on the ground of misjoinder of counts, and on general demurrer, the first being a case for negligence, and the second being in assumpsit for breach of contract.

2d. Because the Court, against the objection of defendants, caused the second plea of defendants, on motion of plaintiff, to be stricken.

3d. Because the Court refused to admit in evidence in reduction of damages, proof to show that defendants offered to replace with cotton of the same grade and quantity the cotton sold, belonging to plaintiff, and only allowed said evi-

dence to be used so far as it might bear to show acquiescence in the sale.

4th. Because, after abandonment by plaintiff in the course of the trial of the first count in his declaration, the Court refused to charge the following request submitted in writing by defendants' counsel: "That the first count having been abandoned by plaintiff, if they find that Gray, Bedell & Hughes were acting as agents of Bass, they are not liable on the second count."

5th. And because the Court refused to charge, except as modified, that, in order to recover, it is incumbent on plaintiff to show the net amount the cotton would have realized had it been sold according to instructions. This the Court refused, and gave: "You may take the price at which the cotton actually sold, and the price at which it should have been sold, and allow reasonable expenses, and the difference would be the measure of damages."

6th. Because the Court refused to charge: "It is necessary that plaintiff should prove that he did direct the sale of the cotton at some particular time," but charged that, on the contrary: "I charge you that, if Bass was informed that his cotton was sold without his instructions, the law did not require him to do a useless thing by directing that sold which had already been sold, but you may look to the evidence and say whether there has been any custom proved to draw bills at sixty days on cotton shipped, and to sell the cotton to meet the bill at maturity; and, if you believe from the evidence, that there was such a custom proved, you may then, in the absence of other proof, infer that Bass would have instructed it to be sold at the time it was customary to sell it, and the damages would then be the difference between the price actually obtained for the cotton and the price it would have been sold at if Bass had directed it to be sold at the maturity of the bill. You may also look to the evidence and see for what purposes the cotton was shipped to Liverpool; whether or not the evidence shows it was the intention

and object of the plaintiff, communicated to the defendants in shipping the cotton to Liverpool, to hold it until spring; and, if you believe the evidence so shows, you may then determine at what time in the spring Bass would have directed it sold, and the measure of damages would be the difference between the price of the cotton at the time it was sold and the price it would have brought in the spring at such time, as you may determine from the evidence, Bass would have directed it sold."

7th. Because the Court refused to charge: "If the jury believe from the evidence that Bass received the draft of £505 6s. 7d. on the 1st April, 1868, being the balance account sales rendered, from Liverpool, and exhibited to him, and that he did not notify Gray, Bedell & Hughes that he still dissented from said sale, this would be considered in law a ratification of the sale;" but charged: "It would amount to a ratification if the parties intended it as a settlement, otherwise it would not."

8th. Because the Court refused to charge that: "A receipt from Gray, Bedell & Hughes to J. H. Bass for $1,530 00, on account, is evidence to show that Bass owed Gray, Bedell & Hughes that much money, but is no evidence to show that Gray, Bedell & Hughes owed Bass anything," which charge the Court refused to give, as asked, but said: "Ordinarily, it would prove that, but in this case the jury may take the receipt in connection with other evidence in the case, and say what it proves."

9th. Because the Court refused to charge: "If you believe from the evidence that plaintiff, on being informed of the facts, dissented, and afterwards said, 'damn it, let it go,' that is in law a ratification;" and said on the contrary: "I tell the jury it is a question for them to determine with what intent the remark was made."

10th. Because the Court refused to charge: "That a consignee advancing and being under acceptance, has a discretion to sell the product advanced upon, even before the bill matures. (Refused as abstract.)

11th. Because the Court did charge as follows: ' plaintiff alleges that the defendants undertook and ass to ship for plaintiff to Liverpool, one hundred and ten of cotton, and to hold the same, in Liverpool, until the rity of a sixty day bill drawn against it, and not t until directed to do so by plaintiff. This is a quest fact to be determined by you from the evidence. Yo look at all the evidence in the case, and say whether the defendants so undertook and assumed; and if you come to the conclusion that the defendants did not so u take and assume, then I charge you this amounted agreement on their part to ship the cotton to Liverpo to hold it there until such time as the plaintiff should it to be sold. Plaintiff also alleges that the defendant mitted their factors in Liverpool to sell the cotton bef directed it to be sold. If you believe the evidence this, then I charge you the defendants have violated agreement; that is to say, if you believe they mad agreement before stated, they are responsible to the pl for the damages resulting from such violation."

"In determining the measure of damages, I give yo as the rule. It is insisted by defendants' counsel that i necessary that plaintiff should have ordered the cotto at some particular time, to fix the amount of damages, charge you that if plaintiff was informed that his cotto been sold without his instructions, the law did not c him to do a useless thing, by directing that sold whic already been sold; but you may look to the evidence a whether or not there has been any custom proved to bills at sixty days on cotton shipped and to sell the to meet the bill at maturity, and if you believe that th dence shows there was such a custom, you may then in the absence of other proof, that plaintiff would ha structed it to be sold at the time it was customary to s and the measure of damages would be then the diff between the price actually obtained for it, and the pr

h it would have been sold, if plaintiff had directed it to
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he intention of plaintiff, communicated to the defend-
in shipping the cotton to Liverpool, to hold it until
g; and if you believe the evidence so shows, you may
determine at what time in the spring plaintiff would
ordered it sold, and the measure of damages would be
lifference between the price of the cotton at the time it
actually sold and the price it would have brought at
time in the spring as you may determine from the evi-
e that plaintiff would have directed it to be sold. This
e plaintiff's side of the case."

The defendants rely on two propositions: First, they say
never made any such contract. Well, you will look at
vidence and say whether they made such a contract as
forth. Of course if you find they never made such
act, they are not liable for a violation of it. This fact
will determine from the evidence.

They next say, that if they made such a contract, after it
violated, and the plaintiff was fully informed of the fact
ne sale, he ratified it—first, by not expressly dissenting
it. Now, on this point, I charge you that if the sale
place contrary to the agreement, and plaintiff was in-
ed of all the facts and circumstances of the sale, and did
dissent from it, then this, in law, would be a ratification,
you will say from the evidence whether or not he did
nt.

Defendants next say that plaintiff ratified the sale by
pting a bill of exchange drawn by defendants on Blissey,
wn & Company, for balance proceeds of sale cotton,
r account sales exhibited to him. On this point I charge
that the non-acceptance of a bill of exchange for the
ce of sale does not amount to a ratification, nor is a
fication, unless it was intended by the parties as a settle-

ment when it was accepted. If it was so intended by both parties, then it was a ratification; if it was not so intended by the parties, then the acceptance of the bill of exchange was not a ratification of the sale."

12th. Because in the argument of the case by plaintiff's counsel, B. A. Thornton, who opened the case, and was arguing on the first count to show negligence, was stopped by the Court inquiring: "On what count do you rely?" And counsel replied, "On the contract," after which the counsel for plaintiff no longer argued that question of negligence, nor did defendant's counsel touch upon it, except to caution the jury not to confound it with the second count, and yet, when the counsel for defendant asked the Court to charge the jury: "That the first count had been abandoned, and that if Gray, Bedell & Hughes, acting as agents of Bass, they were not liable on the second count," the Court refused so to charge.

13th. Because the verdict of the jury is excessive.

14th. Because it is manifestly against the weight of evidence.

15th. Because it is contrary to evidence and the principles of justice and equity.

16th. Because it is decidedly and strongly against the weight of evidence.

LOCHRANE, C. J.

1. The question raised on the declaration in this case we do not regard as error. The suit originally proceeded on the principle of implied contract, and the amendment charges a *special contract.* Such a joinder is clearly within our law of amendments, and we will not dwell on this point.

The facts of the case may be substantially stated as follows: John H. Bass had a lot of cotton in Columbus which he shipped through the plaintiff in error to Liverpool. He alleges and proves that he desired instructions given not to sell

his cotton until some time in the spring, after the expiration of sixty days, upon which he was to have an advance of forty dollars per bale. The cotton was shipped to Starr & Roberts at Savannah, and through them, by Wilder & Fullarton, to Blissey, Brown & Company, Liverpool, with instructions by Gray Bedell & Hughes. A draft on it was negotiated by these parties, and the cotton sold by the consignees to arrive, before it probably left the port of Savannah. As soon as this fact was ascertained, it appears that Bass had notice, and Gray, Bedell & Hughes were themselves surprised at the indecent haste. Some letters were written which brought about an alleged offer to *replace* the cotton, but the mode by Bass evidence was, that he could replace and they would hold, etc. which he declined. It was also in evidence that the cotton went to Starr & Roberts, without any instructions, to be fully advanced on, and to take the customary course of cotton to Europe. Mr. Gray's testimony shows that the cotton was shipped for Bass; that they showed him the correspondence as received; that they told him his bill of sixty days would hold the cotton for that time, and if he desired to hold longer he could do so. Afterwards, Bass received balance due on account of sales and paid them an account due them. All these facts were in evidence, and out of them arose various requests to charge, which were refused, and other charges given and excepted to.

2. We have carefully considered the facts and the law in this case; the doctrine of principal and agent and ratification, and have examined the Judge's charge in the light of the facts as they were presented to the jury, and have come to the conclusion that there was no error in the charge of the Court, or in the finding of the jury. It makes no difference in what capacity Gray, Bedell & Hughes agreed to ship Bass' cotton, whether as principal or as agent, if the contract was to hold it until spring for Bass, the liability is the same. When the jury have evidence of a fact and find thereon, we will not control their finding, except it is strongly and deci-

dedly against the weight of the evidence. In this case the testimony of Bass was before the jury on the fact of the contract, and it was for them to find, and their finding that Bass contracted with them to have his cotton shipped and held, is sustained by proof.

3. Again, if the jury believed Bass, and they had a right to believe him, he never ratified the sale by any act of his, and the jury were properly charged by the Judge, that the intention to do so was for them to decide.

4. Again, if the jury had evidence of the value of the cotton in the spring running up, from sale to sixty days after bill, and if they believed that it was not the intention of Bass to sell up to a certain time, and they took the price at that time, less expenses, it was a fair and equitable view of the case.

Again, Bass knew nothing of these drafts on Blissey, Brown & Company. They were drawn by parties who were unknown to Bass. Bass had not drawn, nor had he knowledge, nor did he know who got the cotton in Savannah as consignees of Gray, Bedell & Hughes. All this which brought about the sale of his cotton was bad faith, in view of the instructions and manifest intention of Bass not to sell. They traded his cotton as their own, drawing on it and selling it at their own whim and pleasure; and Gray, Bedell & Hughes, while not themselves doing the act, are the men who violated the instructions and put it into the hands of others to commit it. In this view of the case, then, we say that, under the facts of this case, we cannot set aside the verdict, nor order a new trial for the errors assigned.

Judgment affirmed.

NETT & COMPANY, plaintiffs in error, *vs.* TERRY & SMITH, defendants in error.

is not sufficient to plead that a contract "was rescinded;" the plea uld show how it was rescinded. (R.)

ere a tender of money is relied on, the Court may strike the plea, he party has not the money ready to pay into Court. (R.)

nonsuit will be refused if there be slight evidence to support plain-'s case. (R.)

ien a party shipped flour to another, and the consignee declined pting it upon the ground that it was not such as he ordered, imme-ely notified the shipper of the fact and that he held it subject to order, and the shipper afterward sent his agent to receive the flour, the consignee set up his claim for freight and expense paid before very, and the agent declined paying the same, and went off, leav-the flour in the consignee's hands, and he had it sold as the prop-of the shipper; and on the trial of the case brought against the signee, the Judge rejected the testimony of a witness showing the and what the flour brought:

The Court erred; for the consignee had a right to be paid the ac-amount of freight and expense on the flour, if it did not come up what he ordered, which he was entitled to receive before he gave up possession of the flour:

That the consignee had the right after reasonable notice to the signor of such expense and its non-payment, to sell sufficient for reimbursement, and if the commodity was perishable, to sell all, by proof show his actings and doings in the premises; and the on the trial, to ascertain the value of such commodity, will con-er, as competent evidence, what it actually brought, in connection h the mode and manner, and necessity of the sale.

escission. Lien. Before Judge JOHNSON. Muscogee erior Court. May Term, 1870.

erry & Smith, commission merchants, sued Barnett & pany on an open account for cash advanced in purchas-goods for them, commissions, etc. Part of the items were llows: 1866, January 2d, to cash advanced for one hun-and thirty barrels flour, invoiced superfine, $962 00, barrels flour, invoiced extra, $437 50. The defendants ded that all the other items of the account had been paid, that they did not owe for the flour, because it was un-

sound and not such as they had ordered, and upon its arrival they advised plaintiff that they would not receive it and plaintiff accepted it back and thus relieved them of liability for the said advances.

The record shows no more than this. But the *bill of exceptions* recites that defendant also pleaded, 1st. "That the contract for the sale of said flour was, before the commencement of this suit, rescinded, and of this they put themselves upon the country. 2d. That during the pendency of this suit they tendered to plaintiff's attorney $329 05, with interest and costs of suit, the full amount due on the account sued on, and the same was refused; "that they have at all times since been and still are ready and willing and now offer to pay the same to the plaintiff, and this they are ready to verify." And the bill of exceptions recites that the Court struck said "1st" plea, because it did not aver any return of the flour, nor any offer to return it, and that he struck the "2d" because defendant's attorney, when asked if they had said money in Court to deposit, they said no, that their clients were not present.

All else that transpired upon the trial, necessary for an understanding of the decision of this Court, was substantially as follows: The payment of the other items of the account was not controverted. Plaintiffs introduced evidence to show that said flour was such as was ordered and sound, and that when their agent offered to take it back, defendants refused to deliver it unless plaintiffs would pay what defendants had paid out on it for freight, etc., and also pay $570 00, which defendants claimed because a former shipment of one hundred and eighty-five barrels of flour was not good, and by which the defendants reduced the balance against themselves to $329 05. A motion for non-suit was overruled.

On the part of the defense, various letters of plaintiffs were read, showing that plaintiffs claimed that the flour was good when shipped, was injured on shipboard (for which ship owner should pay) but stating that their agent would call and

ake it back. One of the defendants testified that the first lot f flour was paid for in November, 1865, before it arrived and efore defendants had ever seen it, that it arrived in Decemer, 1865, and was found to be inferior to such as was ordered, y $2 00 or $3 00 per barrel in value, and plaintiffs were t once advised that defendants held it subject to their order; laintiffs wrote that their agent would call and settle it, and e did call, and instructed defendants to sell it to the best dvantage for and on account of plaintiffs. The second lot rived in February, 1868; defendants refused to receive it, leging that it was not such as they ordered, and plainffs, upon notice of this, wrote that their agent would call nd take charge of this second lot. When the agent arrived, efendants showed him the flour, and turned it over to him, t, upon his being about to remove it, they demanded the eights which they had paid on this lot and the damages aimed on the first lot, and would not let him take it away, ecause he would not consent to the said demand. This gent had sold and taken away ten barrels of it, but the next y the party to whom they were sold returned nine of them, aying they were not merchantable, etc.) and said agent left ith defendants what the other barrel had been sold for, and ey put it to plaintiff's credit. Without more, this agent ent away. The flour was likely to spoil, and defendants ld it for as much as they could get, and placed the amount the plaintiff's credit.

He further proposed to testify that the actual expenses aid out by defendants on this last lot of flour was $754 55, -wit: freight from Louisville, Kentucky, to Columbus, eorgia, $675 00; insurance, $43 55; drayage and wharfge, $36 00; but the Court rejected this evidence as irrelevant.

He further testified that they sold said last lot of flour for $[illegible] 00, from which, deducting said expenses, (rejected) $135 40 for other insurance, taxes and commissions on [illegible], $89? 05 due plaintiff; from which, deducting said

$570 00 damages claimed as to the former lot, left $329 05, the amount admitted to be due to plaintiffs.

The Court charged the jury among other things: 1st. That if the flour was such as was ordered, defendants were liable for it; but if it was not of the quality ordered, defendants were only liable for the value of that which was delivered according to the market price, and if the quality was inferior the defendants were entitled to have the price abated.

2d. Defendants could not rescind the contract and hold the flour for expenses unpaid, or for an unsettled balance in their favor; that the contract could only be rescinded by a return of the flour or an absolute and unconditional offer to rescind it.

He was requested to charge that "if the flour was not such as was ordered, and defendants, as soon as the flour was received, notified the plaintiffs that it was subject to their order, and plaintiffs sent an agent to Columbus for the flour, and if this agent took charge of and actually received from defendants and disposed of ten barrels of it, then, if, after that, defendants retained the balance and refused to deliver it until the expenses upon the same had been repaid, this did not revive the contract for the sale of the flour, and the jury should find for the defendants." He refused so to charge, but charged that if plaintiffs had received back any part of said flour, defendants were not liable for that part, but if they refused to deliver any of it to the plaintiffs, they were liable for its value and could not retain it for expenses or an unpaid balance, and at the same time put an end to the contract.

The verdict was for plaintiffs, for $1,249 90 principal, $309 60 interest, and costs of suit.

Barnett & Company say that the Court erred in rejecting said part of the evidence of defendant, in charging as he did, and in said refusal to charge.

Barnett & Company *vs.* Terry & Smith.

PEABODY & BRANNON, for plaintiff in error. Rescission a defense: Code, section 2808; 2 Par. on Con., 677, and is question for the jury, 2 Par. on C., 677; 4 M. & G., 898.

RAMSEY & RAMSEY, by BLANDFORD, for defendants.

LOCHRANE, C. J.

This was an action brought to recover money alleged to due on an open account. When the case came up for trial e defendant pleaded, among other things, that the contract lative to the item of flour, which formed the matter in con-oversy, had been rescinded before the commencement of the it, and also a plea setting up tender of a certain amount payment. The Court struck out these pleas, the one on the ound that the plea did not allege a return of the flour, or er to return it, and the other on the ground that the money leged to be due and tendered, was not in Court ready to be posited. The case proceeded to the jury, and evidence as submitted by plaintiff, when the defendant moved a non-it, which the Court overruled. Then defendant offered in idence the answers of Myers to a set of interrogatories, nich were stricken out by the Court; and these rulings, gether with the Judge's charges and refusal to charge form e basis of assignment in error upon which the case comes fore this Court.

1. The practice of our Courts is based on no technical eories, and when the cause of action or of defense is sub-antially stated—plainly, clearly and distinctly set forth—jections to form are not favored. But in the plea of recis-n of contract, we are of opinion that it is not sufficient to mply *set out* the fact as a legal result; but the opposite rty is entitled to be put in the possession of the circum-nces relied on to establish it. If in writing, it should be t out; and if arising from evidence, sufficient clearness of tement of the points relied on ought to be averred.

2. In relation to the plea of tender. The inquiry made by the Court was one within his discretionary power. When tender is set up in bar of an action pending, the Court may call on the party tendering to pay the money into Court. It is an admission of so much money due, and if the party relies on it as a plea to release him from interest, it is not error to call upon him to comply with his offer, for the plea sets up he is then and has always been ready to pay that sum admitted to be due. If he desires advantage from it he must be ready to perform when called on by the Court.

3. We go on, however, to the more important question of this case. Non-suit will not be granted when there is slight evidence to go to the jury. In this case, we find by reference to the evidence, that there was sufficient to have carried the case to the jury, and there was no error in overruling the motion for non-suit.

4. But we are of opinion that the Court erred in rejecting the testimony of Myers, offered by the defendants. It appears that Terry & Smith sent a lot of flour to Barnett & Company, which flour was not according to the order of the parties; and when received, Barnett & Company at once notified Terry & Smith that they held the flour subject to their order. They then sent an agent to Columbus to take charge of the flour, who sold some part of it, when Barnett & Company set up their claim to freight paid out and storage expenses upon the flour. It is also in evidence that they set up claim for some damage which they held against the parties on a former shipment of flour. The agent of Terry & Smith refused to take the flour and pay these demands; and Myers' evidence, rejected, was to the effect that he had sold the flour and gave account sales and amounts.

The Judge charged in effect against the right of Barnett & Company to set up their claim for freight and expenses on this flour.

The rule of law governing cases of this character, we lay down to be this: Where a commission merchant ships pro-

ice to another, who receives the same, paying freight and xpenses thereon, and on examination it is found that the ticles are not in kind or in quality what were ordered, and e at once gives notice to the shipper of this fact and that e holds subject to his order, in such case the act of receiving not such a performance as makes the contract valid and inding on him; and the party shipping is bound for all eight and expense paid out in the premises; and the consignee has a lien on the property to this effect. And in case he party does not come forward and pay such freight and xpense, and the consignee, in good faith, and when the roperty is of such a character as would deteriorate by length f storage, has some sold, his action in the premises is proper vidence to go to the jury, to be submitted with all the facts f the case, and to be considered by them in ascertaining the mount of verdict they should find. The value of the property being the main issue in such case, the price it sold at, if old in good faith, is competent evidence to go to the jury, to how that fact, not conclusive but competent and pertinent estimony.

Judgment reversed, on the ground that the Court erred in ejecting Myers' evidence in this case.

L. L. Camp, plaintiff in error, *vs.* Nancy Phillips, administratrix, defendant in error.

Where, in a proceeding under the Relief Law of 1868, setting up an equitable defense against a judgment obtained in 1860, it was alleged in the motion that the defendant's intestate (then in life) had, during the war, in 1868, sold a valuable real estate, on the assurance of the plaintiff that he would receive in payment of his judgment the proceeds, and it appeared in evidence that the plaintiff had agreed to receive "bank bills;" that the defendant's intestate had sold his said

estate, taking as part of the consideration "bank bills," then worth one for five of currency, and had by his agent, the sheriff of the county, tendered to plaintiff bank bills to the full amount of the judgment, which he refused, and the bills were left with the sheriff, who exchanged them for Confederate money, and then Confederate bonds, and the whole was lost; and the jury found the execution satisfied, and the Judge refused a new trial:

Held, That, whilst this Court is not exactly satisfied with the verdict, it not appearing positively that the agreement to take the bills was before the sale by the defendant of his property, yet, as there was evidence from which this might fairly be inferred, this Court will not control the discretion of the Court below in refusing a new trial.

It is not error in the Court below to refuse to make a charge requested in writing, if the same be not pertinent to the evidence.

When a distinct issue is presented in the pleadings, it is not error in the Judge to charge the law in relation thereto, though the evidence be very slight upon that particular point.

LOCHRANE, C. J., concurred:

WARNER, J., dissented upon the ground that the charge was upon *assumed* facts. (R.)

Relief Act of 1868. New Trial. Before Judge GREEN. Newton Superior Court. September Term, 1870.

On the 27th of September, 1860, Green B. Turner obtained a judgment in said county against Noah Phillips for $2,000 00 principal, and $766 02 interest to that date. *Fi. fa.* was issued in October, 1860. In May, 1861, Turner transferred this *fi. fa.* and judgment to Camp. Phillips died in 1864, and his wife administered upon his estate. On the 5th of March, 1867, she paid $650 00 on said *fi. fa.* to Camp. On the 7th of October, 1868, the *fi. fa.* was levied upon certain property of said Phillips, deceased. Mrs. Phillips claimed the benefit of the Relief Act of 1868. On the trial, Camp's counsel asked the Court to rule that said Act was unconstitutional, because it impaired the obligation of contracts, etc. But he held it to be constitutional.

What property Phillips had at the date of the contract, and what he lost during the war and by its results, (as the

emancipation of his slaves,) was shown. It is not material here. There was no evidence that Turner or Camp had any agency in these losses. Besides that, there was other evidence of an effort to pay, as follows:

Phillips' son testified, that, some time in the last year, Camp told him that he met deceased near the bridge at the factory, when deceased asked him if he would take bank money, and he, Camp, said he would, and that when deceased tendered him the bank bills he refused them, because they were not all bank bills. Deceased sold the Cedar Shoals to Steedman at $18,000 00, took ten shares in Covington Mills in part payment, valued at $1,000 00. Steedman owes the estate about $3,000 00, he thought, for personal property bought at the sale.

Steedman swore that he bought of deceased half interest in the Cedar Shoals at $18,000 00 in 1863, and paid him $5,000 00 in bank bills. He let deceased have property worth $1,500 00 then, and yet witness bought some things at the sale, for which he had never paid. Witness offered $3,000 00 for the machinery and stock, or deceased's part of the same; there has been no settlement of the debt since the war. Bank bills at the time of said trade were worth two or three times as much as the Confederate currency; he was to pay deceased $5,000 00 in bank bills, and deceased was to pay off the judgments against deceased.

The Clerk of the Superior Court testified, that in 1863 Phillips deposited with him about $3,100 00 in bank bills, to pay off said *fi. fa.*; some on Northwestern Bank, some on the Georgia Railroad Bank, and some on the Bank of Fulton, mostly Northwestern Bank, and but little on the Georgia Railroad and Banking Company. Witness thinks Phillips sold half of his factory to pay his debts, and that the bills of Northwestern Bank were then about as good as any bank bills. Witness turned these bills over to the sheriff.

The sheriff testified, that as agent for Phillips, he went to Camp, who had the *fi. fa.*, and asked him if he would take

half in bank bills, and half in Confederate money. Camp refused; said he had promised to take bank bills. He then offered to pay all in bank bills. Camp refused, saying that he wanted Georgia Railroad bills. The money was not with witness at the time, but in his office, but Camp knew he had it. This money was afterwards invested in Confederate States cotton bonds, and they remained in the office till they became worthless.

Another witness said that Northwestern bills were then about as good as any, and that when the bills were tendered to Camp, he said he was going to leave the country, and preferred to hold the judgment.

It appeared by other evidence that said investment in bonds was made, and the bonds were put in evidence. And it was shown that this was a security debt, contracted in 1856.

Plaintiff's counsel requested the Court to charge the jury, as follows: "1st. That they must render their verdict upon principles of equity, as regulated by law. 2d. That by law the judgments of a Court of competent jurisdiction of the person and subject matter, are conclusive of the rights of the parties and their privies, unless properly attacked for fraud. 3d. That to reduce the judgment upon the ground of loss of defendant, with which plaintiff had no connection, would impair the obligation of that contract, which they could not by law do. 4th. That to entitle the defendant to a reduction of the amount of the judgment, on the ground of equities, these equities must exist between the parties, and at the time of the contract. 5th. That the Court must explain to the jury what the statute and the law means by the equities between the parties. 6th. That the jury have no power to make contracts for the parties, nor have they the right to alter or change the contract made by the parties, nor have the jury the right to mould the contract to suit their pleasure. That, if the jury attempt to make a contract for the parties, or to change or vary the contract to suit their views of equity,

uch verdict would impair the obligation of the contract, nd be void, as in conflict with the Constitution of the Jnited States. 7th. That, although the law permits evilence to go to the jury to show the amount and value of he property, at the time the debt was contracted, or the conract entered into, and to show upon the faith of what proprty the credit was given, and of what tender or tenders of ayment he made to the creditor at any time, and that the on-payment of the debt was owing to the refusal of the reditor to receive the money tendered, or offered to be tenlered, and of the destruction or the loss of the property, pon which the faith of the credit was given, and how and n what manner the property was destroyed or lost, and by hose fault, yet this evidence does not justify the jury in inding a verdict that impairs the obligation of a contract. The words 'according to the equities of the case,' does not onfer upon the jury an unlimited, arbitrary discretion. But hey must render their verdict on principles of equity as egulated by law, and that by law, judgments of a Court of ompetent jurisdiction of the person and subject matter are onclusive of the rights of the parties, unless attacked properly for fraud. All of which said written requests were refused by the Court. The Court charged the jury as follows:

First. He read to the jury the first and second sections of an Act of the Legislature of Georgia, entitled an Act for the Relief of Debtors, and to authorize the adjustment of debts upon the principles of equity, passed in 1868, and instructed the jury that the said Act was constitutional, and that the Supreme Court had so decided it. Second. As requested in writing by counsel for defendant, the Court charged the jury 'that if Camp agreed with Phillips to receive bank bills in payment of the debt, and Phillips went forward and sold property at a less price than he could have got for it in the common currency of the country, and Phillips tendered him the bank bills in a reasonable time, then it amounts to a

payment, and that they, the jury, should find for Mrs. Phillips. The jury returned a verdict as follows: "We, the jury, find in favor of the movant, Mrs. Nancy Phillips, administratrix, and that the *fi. fa.* and judgment has been paid." Whereupon counsel for plaintiff moved for a new trial in the said cause, on the following grounds, to-wit: Because the Court held said Act of 1868 to be constitutional; because he charged, as requested by defendant, when there was no evidence to support said charge; because the Court refused to charge as requested by plaintiff's counsel; because the verdict was contrary to evidence, etc.; and because of the admission of certain evidence not material for our purposes. He refused a new trial on all the grounds taken, and also because said judgment was, on its face, dormant.

This refusal of a new trial was then and there protested against, counsel for plaintiff stating, in his place, that the plaintiff, before the lapse of the seven years from the date of the said judgment, had sued out a summons of garnishment for Enoch Steedman on this said judgment, and had judgment on said garnishment for a large amount of this debt, and that the said order in that form might, under the said verdict and judgment in the said case, injuriously affect the rights of the plaintiff, for that defendant had already moved to vacate the said judgment on the garnishment against E. Steedman. With the record of the cause, the Clerk sent up a copy of said garnishment papers, showing the truth of said statement.

The refusal of a new trial is assigned as error.

JOHN J. FLOYD, for plaintiff in error.

A. M. SPEER; A. B. SIMS, for defendant.

McCAY, J.

This is a case under the Relief Act of 1868. Before that Act, the defendant in the judgment would have been compelled to set up her rights in equity. Under that Act, she asserts them in a Court of law. Her claim is, that, by the conduct of the plaintiff in the judgment, *since* the date of the contract, and *since* the judgment an equity has arisen between them, which, under the Act of 1868, she is entitled to have adjusted.

It is admitted that if, in fact, Phillips sold his property for bank bills, or procured bank bills in any way, on the promise of Camp to take them in discharge of the judgment, and Camp, *after* Phillips had so procured them, capriciously refused to receive them, and they were lost in Phillips' hands, then such an equity does exist. The whole case turns on the facts. They have been submitted to a jury, the jury has passed upon them, the Judge has refused a new trial, and an appeal is made to this Court to set aside the verdict and reverse the judgment of the Court.

To justify this, the verdict must not only be strongly and decidedly against the weight of the testimony, but the Judge must have abused his discretion in refusing to disturb it. It comes to us under the sanction of the decision of twelve sworn men, neighbors of the parties, clinched by the judgment of the Court who heard the evidence. For myself, I believe the verdict of the jury to be right, on the facts.

It is perfectly established that Phillips sold his property for the purpose of paying his debts; that Camp promised him he would take bank bills; that Phillips required of the purchaser bank bills; that such a requirement was unusual and bank bills at a considerable premium, indeed, as the history of the times is, they were thought to be as good as gold; that this particular execution was in the mind of Phillips and of the purchaser; that Camp refused to take the bills, though tendered by the sheriff, shortly after the sale,

and that the bills were lost by the results of the war. There is not a break in this testimony but one. It is not, I admit, *perfectly* clear that Phillips acted on the promise of Camp, or that this promise of Camp was *before* the sale of his property by Phillips. The dates of the several events are not given in the bill of exceptions, but it seems to me that the evidence of Camp's promise being anterior to the sale is sufficiently strong to sustain the verdict.

The money does not seem to have gone into Phillip's hands at all. Evidently the purchaser required it to be paid directly to the officers; as the execution was in Camp's hands, they make the offer to pay. Evidently the money was procured by Phillips, deposited with the Clerk and tendered in view of the promise. The inference from the actual facts is strong. Why should Phillips exact bank bills? Why should the money be deposited with the Clerk? Why should Camp *admit* to the sheriff that he had made the promise, if it was not understood that the promise to take the bills was Phillips' motive for the sale and for exacting the payment in bank bills. We think the jury had a right so to conclude. Indeed, we do not doubt but that this was the truth of the case. If this be so, the equity of the case was with the complainant, and the verdict ought to stand. The inference from the whole conduct of Steedman, Phillips, the sheriff, and of Camp himself, that this promise was before the sale, is, to my mind, very strong, and I cannot consent to set aside this verdict, and hold the jury to have acted contrary to the evidence, because I cannot say that the inference is irresistable.

LOCHRANE, C. J., concurring.

The facts in this case have already been stated, and it is not necessary to recite them further than it may be necessary to elucidate our opinion of concurrence in the judgment pronounced by the Court. In *Graham vs. Clarke*, this Court

held that, to sustain a plea, under the Relief Act of 1868, it must appear that the loss which the defendant claims as an equitable ground for reducing the plaintiff's claim was, in some way, the fault of the plaintiff. Mere loss of property, by the late war, or in consequence of its result, is not sufficient ground for the reduction of a debt contracted before the war. Such is the judgment of the Court in the case referred to; and the naked issue in this case is whether there was sufficient testimony to sustain the finding of the jury, under the principles of law which we have laid down. For, if the record discloses such testimony, even although it is slight, this Court will not reverse the judgment of the Court below refusing to grant a new trial. Upon this point we may remark, in advance, that there is no difficulty in sustaining the verdict of the jury, upon the ground that Camp agreed to receive bank bills in payment of this execution. The question is, at what time; whether before the sale of the property of Phillips, or subsequently thereto. Steedman testifies that, at the time he purchased the property from Phillips, the agreement between Phillips and himself was that he, Phillips, was to pay off the executions existing against him, and that he paid Phillips bank bills as part consideration for the purchase of the property. The amount of the execution was deposited, in bank bills, with the Clerk of the Superior Court, from which the execution issued, and were, by him, turned over to the sheriff, who offered them to the plaintiff in error, who admitted he had agreed to take bank bills, but required Georgia Railroad bills, and refused such as were then offered. In a conversation between young Phillips and Camp, Camp admitted that he had agreed to take bank money from his father in payment of his execution.

In the view which we take of the evidence in this case, we are satisfied, from all the surrounding circumstances, that there was evidence upon which the jury might find that the sale, by Phillips, of his property for bank bills, with which to pay his debts, coupled with the admission of Mr. Camp

that he had agreed to receive such currency in payment for his judgment, and, when tendered to him by the sheriff, his objection only being to the character of the bank bills, and not to the fact that he had so agreed to receive bank bills, was such an admission, coupled with such sale, and tender, and deposit, to the amount of the execution in the Clerk's office of the Superior Court, as sustained the jury in their finding. It will be recollected, in this case, that Mr. Phillips, the party with whom this agreement was originally made, in 1863, and who made this sacrifice of his property for a currency which had ceased to be common or usual in transactions of trade or business, sleeps in his grave since 1864, and that the evidence of this contract comes from the lips of Camp, by admissions made, and nowhere controverted or contradicted in this record, and must be taken in connection with the acts of Phillips, as appears from the evidence of the Clerk and sheriff, with every legitimate inference that may shed light upon the purpose of the one, as connected with the promise and agreements of the other. I therefore concur in the opinion pronounced by the Court, upon the principle that the agreement to take the bank bills in extinguishment of this execution before the sale of the property was sufficiently proved to sustain the finding of the jury.

For myself, however, I do not hold it necessary, to bring the defense within the principle of the Relief Act, that the party should have sold his property upon an agreement first entered into before the sale; that the plaintiff should receive the bank bills; nor do I hold such to be the principle held by this Court in 40*th Georgia*. The Judge, in delivering that opinion, evidently puts each case upon its own peculiar equities; and in the case of *Cutts & Johnson vs. Hardee*, in 38*th Georgia*, defining the equities, as well as the general proposition therein laid down by the Court, and in a fair construction of the statute, any act of the plaintiff, growing out of the contract, or arising, subsequently, by which the plaintiff had occasioned a loss by some failure of his to do

what he had agreed, or which would connect him with such loss by virtue of any act upon his part, ought to go to the jury, to be by them considered and adjudicated. And, while we recognize the mere whim of the jury in the assertion of equity, without proof, will not be supported by the Courts, still, their discretion is broad—intentionally broad—as conferred by the statute, where even proof is slight to connect the plaintiff with the loss of the defendant's property, which may be proved by circumstances as well as by positive testimony. This discretion ought not be interfered with or set aside, except in very flagrant cases of abuse. And where, in 1863, a party agreed to take any specific currency in extinguishment of a debt, in or out of judgment, and the defendent, by sale of property, or by loan, or in any other manner procured said funds and tendered them, in compliance with such agreement, and the plaintiff refused to perform what he had agreed, such failure constitutes an equity, under the statute, the adjustment of which, by verdict, the Courts would not be authorized to disregard and set aside.

WARNER, J., dissenting.

This was an application to open a judgment under the provisions of the second section of the Relief Act of 1868, and, upon the trial of an issue between the parties, the Court charged the jury, "that if Camp agreed with Phillips to receive bank bills in payment of the debt, and Phillips went forward and sold property at a less price than he could have got for it in the common currency of the country, and Phillips tendered him the bank bills in a reasonable time, then it amounts to a payment, and that the jury should find for Mrs. Phillips." The charge of the Court assumes that there was evidence that Camp agreed with Phillips to receive bank bills in payment of his debt *before* Phillips sold his property; whereas, there is no evidence in the record of any such agreement between the parties. The charge of the Court

also assumes that there was evidence that Phillips, in pursuance of *that agreement*, went forward and sold his property at a *less price* in bank bills than he could have got for it in the common currency of the country; whereas, there is no evidence in the record that Phillips went forward and sold his property at a *less price* in bank bills, in pursuance of that or any other agreement made with Camp.

This charge of the Court to the jury, in view of the facts disclosed by the record, was, in my judgment, erroneous, and being in relation to a vital point in the case for the consideration of the jury in adjusting the equities between the parties, I am of the opinion the judgment of the Court below should be reversed.

THE MACON & WESTERN RAILROAD COMPANY, plaintiff in error, *vs.* JAMES M. BABER, defendant in error.

1. Where, in an action brought under the provisions of section 2988 of the Code, for stock killed, the notice required was served personally by the plaintiff, who attached his affidavit of such service thereto:

Held, That such affidavit was sufficient evidence of such service, and not being traversed, it was not necessary to have produced the witness on the stand to prove the same.

Held again, When the defendant's counsel requested the Judge to charge the jury, "that Mrs. B. turning out the cow in the vicinity of the railroad just before the coming of the train, was negligence and carelessness to be considered by the jury, and that when said cow got upon the track it made B. a trespasser," which the Judge refused, but charged the jury, "that if it were shown that plaintiff's cow was injured by the defendant's servants, the law presumes negligence on their part and they must explain it, and the fact that Mrs. B. turned out the cow, in the vicinity of the railroad, before the train came, was no evidence of carelessness to be considered by the jury, and it was not true that if said cow, so turned out, got upon the track it made plaintiff a trespasser, unless it was inclosed by a lawful fence, that such refusal and the charge given by the Court was not error, under the facts of the case: for the fact of contributory negligence cannot be presumed against the owner of such cattle as ordinarily are turned

The Macon and Western Railroad Company *vs.* Baber.

, by turning such animals out, and the act of their going upon an nclosed railroad track did not constitute him a trespasser.

ilroads. Negligence. Evidence. Trespass. Before e LOCHRANE. Clayton Superior Court. September ı, 1870.

ber brought case against the Macon & Western Rail- Company for killing his cow on the 26th of May, 1869. he trial, Baber's counsel offered in evidence a notice, as ws:

RGIA, CLAYTON COUNTY:

the Macon & Western Railroad Company:—You are hereby noti- at within the last three months, to-wit, on the 26th of May last you damaged the subscriber by killing a milch cow belonging to by the running of a car, engine or locomotive or other machinery ar road; and desiring that the amount of damages may be legally ed, you are hereby required by agent or attorney, or in person, to r at the next term of the Superior Court to be held in said county second Monday in September next, then and there to show cause, exist, why the damages shall not be assessed according to law. 8th of August, 1869. JAMES M. BABER."

a the back of this notice was an affidavit by Baber, tiff, that he served a copy of said notice on the defen- s agent at Jonesboro, on the 18th of August, 1869. ndant's counsel objected to said paper as evidence, be- it did not sufficiently describe the damage done and se the affidavit of plaintiff was insufficient evidence of rvice.

ese objections were overruled, and the paper was read e jury. The evidence of the plaintiff's witnesses showed on the morning of the 26th of May, 1869, just before sual time for the coming of the morning train by Ba- Mrs. Baber turned out said cow; that the cow was running along the side of the track and in front of the when said train arrived; that she suddenly tried to the track in front of the engine and was either struck

by the engine or kicked at it; that she was injured thereby and from that injury died in a few days; that the train was running at usual speed. The engineer and fireman testified positively that the engine did not touch the cow. Other facts showed that the cow was injured by the engine. And this was conceded by defendant's counsel. But they relied upon said evidence to show that it was an accident caused by the cow's crossing in front of the engine so suddenly as not to attract the attention of the engineer or fireman. The value of the cow was shown.

Defendant's counsel requested the Court to charge the jury that Mrs. Baber's turning the cow out, in the vicinity of the railroad, just before the coming of the train, was negligence and carelessness, to be considered by the jury, and that when said cow got upon the track it made Baber a trespasser. The Court refused so to charge, but charged, that if plaintiff's cow was injured by defendant's servants, the law presumes negligence on their part, and they must explain it; that the fact that Mrs. Baber turned out the cow in the vicinity of the railroad before the train came was no evidence of carelessness to be considered by the jury, and that it was not true that if said cow, so turned out, got upon the track it made plaintiff a trespasser, unless it was shown that the defendant's road was inclosed with a lawful fence. The verdict was for the plaintiff for the value of the cow.

Defendant's counsel moved for a new trial, upon the grounds that the verdict was strongly and decidedly against the weight of the evidence, and because the Court erred in admitting said notice as evidence; in refusing to charge as requested, and in charging as he did. He refused a new trial, and that is assigned as error on each of said grounds.

A. W. Hammond & Son, for plaintiff in error, as to service of notice, cited Act of 1853; 18th Ga., 247. As to fences: Prince's Dig., 256; Cobb's N. D., 18; R. Code, sections 1458, *et seq.* As to negligence and trespass: 18th Ga.

R., 679; 19th, 436–7; 24th, 75; 27th, 113; 28th, 93, 111; 30th, 22; 37th, 593; 38th, 431; Code, sec. 2980.

TIDWELL, FEARS & ARNOLD, for defendant.

LOCHRANE, C. J.

1. This was an action brought by Baber against the Macon & Western Railroad for the value of a cow killed at Jonesboro, on the railroad. There are but two questions which are made by the bill of exceptions. One, as to the sufficiency of the notice, under the Act of 1853; and the other, on the charge of the Court. The record discloses that the notice was written in the terms of the Act, and was served by Baber personally, and an affidavit of such service is attached to the notice returned to Court. The question is, was this notice proven by such affidavit: Code, section 2988, provides for notice: "Any person whose stock has been killed by the running of cars may serve a written notice describing the property," etc.; then describing what it shall contain, and on whom to be served, and is silent as to who shall serve such notice, or how it shall be proven. In this case the notice conforms to the requirements of the law, and the simple question raised is, whether the affidavit of the party serving was sufficient proof of such service.

We have considered this question by the analogies and reasons which would require other proof of service than that contained in the record. If we go to the service required by parties other than the sheriffs or such officials, the practice of Courts require that an affidavit will be attached or filed by such parties. Section 4126, Code, provides for such mode in matters in equity. And why would not this be better evidence of the fact than to require the witness in Court? The answer may be made that, the fact of notice being important to maintaining the suit, the right of cross-examination is taken from the party by permitting an affidavit to accomplish the purpose; but we see no sufficient reason, in

such argument, to counteract other and more competent matters connected with its admission.

It will be admitted that the only fact proven by the affidavit is that of service; the notice, itself, is filed in Court, and ought to have upon its face evidence that it had been served; the record would be incomplete without it. Again, the party serving may die, and then there would be manifest injustice in such requirement.

Again, if he were present in Court, he could only prove the fact of service. And if this is denied, the affidavit may be traversed, and an issue made, and the facts tried. But when there is no traverse, for what benefit demand an unnecessary thing not affecting the merits of the case? In our opinion, such notice, with affidavit filed and attached thereto, is the most efficient and proper compliance with the statute.

2. The Court, after the evidence was submitted to the jury, was requested to charge them: "That, Mrs. Baber turning out the cow in the vicinity of the railroad just before the coming of the train, was negligence and carelessness, to be considered by the jury, and that when said cow got upon the track, it made Baber a trespasser," which the Court refused, and charged the jury that, "if it were shown that plaintiff's cow was injured by the defendant's servants, the law presumes negligence on their part, and they must explain it; and the fact that Mrs. Baber turned out the cow, in the vicinity of the railroad, before the train came, was no evidence of carelessness, to be considered by the jury, and it was not true that, if said cow, so turned out, got upon the track, it made plaintiff a trespasser, unless it was shown that the defendant's road was inclosed by a lawful fence." Was the refusal to charge and the charge given by the Court error? We have, in various cases, laid down the principles governing negligence, upon the part of railroads, and it would be an unnecessary trespass to reiterate principles so plainly and uniformly established.

The first question raised upon the charge of the Court is,

that the turning out of the cow in the vicinity of the railroad was not negligence. Under the well known policy and laws of this State, owners of cattle are not compelled to keep them up, or send care-takers to watch them. Cows are, ordinarily, milked and turned out; and, under the facts in this case, we do not think it was error in the Court below to refuse the charge requested. This case differs from the one in 19*th Georgia*, 437; for the owner of mules may have been guilty of some degree of negligence in letting them run at large, in the vicinity of an uninclosed railroad track; for mules are a class of animals generally kept up; their value and disposition to stroll off makes it a matter of common prudence to have them tended, near an uninclosed railroad track. But with cattle it is different. The universal practice of our people is to let them out, and only in exceptional cases, are they kept up. And we do not think the Court erred in charging the jury as he did.

As to the other question, is the charge of the Court that it was not true that, if the cow got upon the track, the owner was a trespasser, unless the railroad was inclosed by a lawful fence. In reviewing the different cases upon this subject which have been decided, we are unable to gather more than mere general analogies, on account of the different statutory provisions prevailing in the different States, the risk of liability is more binding on railroads west than east, and no well settled distinctions are drawn in the principles controlling the various cases. So that we come to the decision of this subject in the light of our own previous adjudications.

The Code contains the general principle. Railroads are liable except there be some fault or negligence upon the part of the plaintiff. If the law does not require him to keep up his cattle he cannot be held negligent in not doing so. It might be said that there is no law requiring railroad corporations to fence their roads. But this being true, it does not follow that failing to fence, all that flows from the fact, is their

failure to recover in cases of trespass on their roads. This is not the law. The law makes them liable for the damage done, and they may calculate the consideration of paying for stock killed or fencing; but we cannot hold that such animals as run at large are trespassers because they get upon an uninclosed railroad, no more than upon an uninclosed field; no more than a rabbit or dog running over it. And we do not think the Court erred in its charge upon this subject under the facts of this case. In Buxton vs. Northeastern Railway Company, Law Reports, 111; Sweeney's Bench cases, Sushing, Judge, held under 68th section, 8 Vic.; requiring the railroads to keep fences—"if the fence is not sufficient, and in consequence the cattle in the adjoining fields stray on to the line and are killed, the company are answerable to the owners, whether they are guilty of negligence or not." And upon the same principle, when the railroad has no fence, we think the same rule would apply; for the doctrine of contributory negligence cannot be presumed against the owner of stock in one case more than in another.

Judgment affirmed.

ISAAC WHEELER, plaintiff in error *vs.* THE STATE OF GEORGIA, defendant in error.

On the trial of a prisoner who was indicted for the crime of murder in the county of DeKalb, where the crime was committed, after endeavoring to procure an impartial jury in the usual manner pointed out by law, the presiding Judge became satisfied that an impartial jury could not be obtained in that county, and passed the following order: "The State *vs.* Isaac Wheeler—The Court being satisfied that an impartial jury cannot be obtained in the county of DeKalb, for the trial of the above stated case, it is ordered by the Court that said case be transferred as to the defendants, from the county of DeKalb to the county of Fulton, and that the same be tried in said county of Fulton instead of the county of DeKalb, and that the Clerk of the Court in DeKalb

make out, certify, and transmit a complete transcript of the record in said case to the Clerk of Fulton Superior Court.

[Signed.] J. D. POPE, J. S. C."

This order of removal was objected to by the defendant, which objection was entered of record, but there is no error assigned in this Court as to that decision of the Court in DeKalb, as required by the 4191st section of the Code, so as to enable this Court to review it. There is another order in the record for the discharge of the jurors who had been sworn, in which it is recited, "that the Court having proceeded according to law to obtain a jury to try said case, and having, after using all necessary means, failed to obtain a jury, the jurors were discharged, and a new trial ordered, which was signed by the presiding Judge. On the trial of the case in Fulton county, the defendant moved to set aside the order removing the case, demurred and plead to the jurisdiction of the Court of that county, insisting upon his right to be tried in DeKalb county, in which the crime was committed, which motion, demurrer and plea were overruled by the Court.

Held, That under the Constitution the Superior Court of DeKalb county, in which the crime was committed, had the original jurisdiction for the trial of the defendant, except when the presiding Judge thereof is satisfied that an impartial jury could not be obtained in that county; and in that event, the Court had the power and authority, under the Constitution, the Act of 6th of October, 1868, and the 4593d section of the Code, with the consent of the Solicitor General and defendant, or his counsel, to select the county in which the defendant should be tried, and to order the case transferred accordingly. The Court *may* transfer the case to the county agreed on by the parties, or in the event they fail or refuse to agree upon any county, then the Court may transfer the trial to such county as he may select. The record in this case does not show that there was any agreement as to the county, but the legal presumption in favor of the judgment is, that they failed or refused to agree upon any county.

Held further, That the judgment of the Court in DeKalb county, removing the case to Fulton county, being the judgment of a Court of competent jurisdiction, could not be *collaterally* attacked in the Superior Court of Fulton county for irregularity, or as having been improperly granted, either on a motion to set it aside, or by demurrer or plea to the jurisdiction of the Court; and that the motion to set it aside, the demurrer and plea to the jurisdiction of the Court were properly overruled.

Held also, That the challenge to the array of jurors impanneled to try the prisoner was properly overruled by the Court, inasmuch as it was not affirmatively shewn that the jurors were not selected from those whose names were in the jury-box, or that they had not been selected and summoned according to law. The legal presumption is, that the

officers of the law performed their duty in the selecting and summoning the jurors, until the contrary is shewn by competent evidence; and the same may be said in regard to the objection made to the twenty-four traverse jurors.

Held again, That there was no material error in the charge of the Court to the jury which could have influenced their verdict. And where the verdict is abundantly sustained by the evidence, as in this case, this Court will not be very *astute* in the discovery of errors, to set it aside, unless they be such as would have probably produced a different result.

Criminal Law. Venue. Jurors, etc. Before Judge LOCHRANE. Fulton Superior Court. September, 1870.

Isaac Wheeler and Pinckney Woodruff were jointly indicted in DeKalb Superior Court for the murder of Stephen Winn, a negro, in DeKalb county, on the 15th of May, 1869. At September Term, 1869, of DeKalb Superior Court, the defendants were arraigned and pleaded not guilty. They severed, and Wheeler was put upon trial. After ten jurymen had been sworn in to try him, Judge Pope, the presiding Judge, passed an order discharging said jurors and ordering a new trial. The reason for this order, recited in it, was that the Court had proceeded according to law to obtain a jury, and had failed, "after using all lawful means." He also passed another order that the case, as to both defendants, be transferred to Fulton Superior Court, and that the Clerk of DeKalb send a certified copy of the record to the Clerk of Fulton Superior Court. The reason for this order, recited in it, was that the Court was satisfied that an impartial jury to try said case could not be obtained in DeKalb county.

Wheeler's counsel then and there filed exceptions *pendente lite* to said transfer and had them certified and entered upon the minutes as required by law. Nothing more, as to this, appears.

In September, 1870, the case came on for trial in Fulton county, before Judge Lochrane, Judge Pope's successor.

Wheeler's counsel moved there to annul said order of transfer, upon the following grounds: 1st. Because the reason given for the change of venue, in the order, was insufficient in law. 2d. Because Judge Pope was mistaken in supposing two more impartial jurors could not have been had in DeKalb county, as many citizens of DeKalb "had not been put on any list or pannel of the jurors summoned in said case." 3d. Because the order was passed over Wheeler's protest "before all lawful and usual means and efforts had been exhausted in the matter." 4th. Because this order was, upon the Court's own motion, without notice to Wheeler and without opportunity for him to produce evidence to show that an impartial jury could be had. 5th. Because the order applied to Woodruff, when no effort had been made to get a jury to try him. 6th. Because the Court was misled and taken by surprise, and, in passing said order, acted hastily, without due deliberation, and to Wheeler's injury.

Wheeler's counsel proposed to argue these grounds. The Court refused to hear argument, and overruled the motion. Wheeler was put upon trial separately. By permission, he withdrew his plea of not guilty, and demurred to the jurisdiction of Fulton Superior Court, averring that the jurisdiction was in DeKalb, because the fact occurred there and the record of change of venue did not show all the facts necessary to change the venue at all or to Fulton county; it does not show a jury could not be had in DeKalb, nor that the Solicitor General and Wheeler's counsel could not agree as to the new venue, or that opportunity for trying to agree was allowed, or opportunity for showing that a jury could be had in DeKalb was allowed. 2d. Because the right to change the venue is a constitutional right, incapable of enforcement without legislation, and no legislation has been had on the subject. This demurrer was overruled.

His counsel then pleaded to the jurisdiction of Fulton Superior Court upon the following grounds: 1st. An impartial jury can now be had, to try said cause, in DeKalb

county, where the indictment was found, etc. 2d. Because the venue had been illegally changed as aforesaid. This plea was overruled. Wheeler then pleaded not guilty.

When the pannel of jurors was put upon him, the array was challenged upon the following grounds: 1st. Because his counsel had asked the Court for the original *venire* upon which the original pannel was ordered to be drawn and summoned, that they might decide whether the same was legally done, and it was refused. 2d. Because it does not appear of record that the pannel of twenty-four jurors were legally drawn and summoned. 3d. Because the pannel of twenty-four is composed in part of persons whose names were not on the original *venire* and were not drawn legally, and the twenty-four jurors, viz: * * * * "were not in the box, composed of upright and intelligent persons, who alone are constituted by law competent jurors to be put upon the prisoner, and they do not appear to the Court to be competent jurors. 4th. Because the names of two of the jury viz: * * are not in the jury box. This challenge to the array was overruled."

4. In selecting the jury, five of the first twenty-four who were put upon prisoner were respectively challenged for cause, upon the ground, that it appeared, from the records and minutes of the Court, that the name of neither of them was in the original pannel, as drawn from the jury box; nor did it appear that either name had been in the jury box. These challenges for cause were overruled. The jury having been impanneled, the State proceeded to introduce the evidence. So much of it as is material here, is as follows: Winn was with a party fishing, at night. This party were negroes. Wheeler, Woodruff, and others, white men, formed another party, hunting on the same creek. The white men came to where the negroes were, and the dogs of the negroes ran out after those of the white men and started to fight. One of the white men hallooed, with an oath, that he would kill the dogs of the negroes if they were not called off. One of the

oes ran up to the white men and Wheeler repeated the at to kill the dogs. The negro parted the dogs and apol-ed, by saying that their dogs were young and untrained. eeler kept talking about shooting the dogs. The negro t back to his party and found them about moving to a rent place. The white men were ahead, and while they bothered about crossing the creek, the parties got to-er. Woodruff "got after" Winn, and Winn said to one is party, "I wish I had brought my pistol." Woodruff , "What do you want with your pistol?" He replied, defend myself, as other men do." Woodruff held out his ol and said, "You talk about shooting into this party?" n replied, "No. I was not talking to you." Woodruff, ing his pistol in Winn's face, said, "You talk about shoot-in this crowd, I will kill you, you G—d d—d yellow of a b——h!" Wheeler was then fifteen or twenty steps d. Woodruff went right off, and Wheeler came with torch in his left hand and his pistol in his right hand, began beating Winn over the head with his pistol, and doing so, though Winn retreated, begging and saying, was not talking to you; please do not do it." Wheeler his arm around Winn, fired his pistol and shot Winn in back of the head. Winn fell, and the next day died the wounds. Wheeler looked at Winn a moment after fell, went to his own party, and when asked by one of n if he had shot Winn, said he did. Some one said he ht not to have done it. He said he "could not take any e from the negroes."

When the evidence as to the killing was concluded, the citor General produced a certified copy of the record of case, so far as they had occurred in DeKalb county, and ed to read only the said orders discharging the ten jury-, and changing the venue to Fulton county. Defendant's sel objected, because that was but a part of said record, because the record did not contain the evidence which taken by the committing magistrates. These objections

were overruled, and the orders were read to the jury. Pending the argument of the cause, Wheeler's counsel asked the Court to deliver his charge in writing, as required by the 234th section of the Revised Code. He proceeded and read to the jury his charge, as follows:

In this case, gentlemen of the jury, you are the judges, both of the law and the facts. It is only my duty to give you the law in charge, and it is for you to apply the law to the facts, with this qualification, gentlemen, that you have the right to disregard the opinion of the law given you in charge by the Court, in case you conscientiously differ with the Court as to what the law is. In the discharge of your duty, both you and the Court have an important duty to perform. We are here to administer the law of the land, irrespective of parties, according to our conscientious convictions of duty, let the consequences fall where they may. And inasmuch as the discharge of this duty is fraught with the greatest interests, and involves the highest and most important trust the law can delegate to men, it becomes you, gentlemen, free from all passion and prejudices, looking only to the law for your light, and the evidence for your facts, to find a verdict, based upon principles of law and justice. We have a simple duty to perform, and that duty is prescribed and limited by your oath when you were impanneled to try the issue formed upon the bill of indictment, and a true verdict give according to the evidence. The transfer of this case, by Judge Pope, is not before you as an issue to try. I have decided this question, and I could further remark, that you are not impanneled to try this case upon anything outside of the law and evidence; color has nothing to do with it, for the law recognizes no distinction of color. Justice is blind to distinctions or position in life, or color of the skin; a colored man has the same rights and is protected by the same law as the white, and no man has any right to infringe upon him; and this principle is essential to justice. Discard from your minds everything that might influence

judgment, predicated upon policy, partiality, or preju-
and take the case, with its evidence alone to guide you
orrect judgment.
id, first, whether or not Stephen Winn is dead, and if
re satisfied that he is dead, the second step you will
in the case is to ascertain how and when and where he
to his death. If you find that he came to his death by
ace, at the time and manner alleged in the indictment,
the next question to consider is, who committed the act?
ming to a conclusion on this subject, you are to look to
cts in evidence before you. The law does not demand
thing to be proven positively, but does demand that
minds will be satisfied. Moral and reasonable certainty
at the law requires; but, in criminal cases, the mental
ction ought to be strong; for the benefit of every doubt
g, reasonably, in the consideration of the case, is given
risoner.

you believe that Stephen Winn was shot by the pris-
the next question in the case, and a very important one
ou to decide, is, under the law of Georgia, what charac-
offense, if any, did he commit. In this consideration,
emen, it will be my duty to give you the law. Section
: Homicide is the killing of a human being, of any age
x, and is of three kinds—murder, manslaughter and
able homicide. It is hardly necessary, gentlemen, un-
e law of this land, to remark that the term used, human
, applies, with equal force, protection and power, to all
s of our people; that the humblest stands before the law
qual of the greatest, and there can be no distinction,
our solemn covenant of official duty. Section 4254
s murder to be the unlawful killing of a human being,
peace of the State, by a person of sound memory and
tion, with malice aforethought, either expressed or im-
. Express malice is that deliberate intention, unlaw-
to take away the life of a fellow-creature, which is
ested by external circumstances capable of proof.

You will see, thus far, if you are satisfied that Wheeler shot deceased, and that the killing was unlawful, it is still necessary to ascertain, from the facts, whether it was with malice; for malice and killing must unite to make the prisoner guilty, under the charge of murder. Under the facts of this case, gentlemen, was the killing of Winn the "unlawful killing of a human being, in the peace of the State?" You will look to the evidence and weigh the various facts detailed by the witnesses. The law regulates and defines the principle governing self-defense, and I will read it to you. Sections 4264, 4265, 4266: "If, after persuasion, remonstrance, or other gentle measures used, a forcible attack on the property or habitation of another cannot be prevented, it shall be justifiable homicide to kill the person so forcibly attacking and invading the property or habitation of another. But it must appear that such killing was absolutely necessary to prevent such attack and invasion, and that a serious injury was intended, or might accrue to the person and property or family of the person killing." Section 4267: "If a person kill another in his defense, it must appear that the danger was so urgent and pressing at the time of the killing that, in order to save his own life, the killing of the other was absolutely necessary; and, it must appear, also, that the person killed was the assailant, or that the slayer had, really, and in good faith, endeavored to decline any further struggle before the mortal blow was given."

Now, to make the *killing lawful*, the law defines what facts must be proven. And to hold *the act lawful*, so tender is the law of life, that it requires the facts to show, as in section 4266, that some forcible attack was made on the property or habitation of another, and that the killing was absolutely necessary to prevent such attack, and that serious injury was intended, or might accrue to the person, property or family of the person killing, or that the danger was so urgent and pressing, at the time of the killing of Winn, that it became necessary, to save his own life, to kill him; and that Winn,

the deceased, was the assailant, and that the person killing him had, really, and in good faith, endeavored to decline any further struggle before taking life.

Now, except the prisoner act within the section of the law just given you in charge, the killing would not be lawful. But if, gentlemen, you find the killing to be unlawful, it becomes your duty to go further, and to inquire whether it was done with malice. For malice is an essential of the crime, and the law defines what constitutes malice. Section 4256: 'Malice shall be implied when no considerable provocation appears, and when all the circumstances of the killing show an abandoned and malignant heart."

Section 4255—"Express malice is that deliberate intention to take away the life of a fellow creature, which is manifested by external circumstances capable of proof," *as by the weapon used*, and the deliberate action of the party.

I have given you thus far the sections of the law applicable to murder. It is for you to pass upon the evidence.

If you believe that Stephen Winn came to his death at the hand of the prisoner, your duty goes further, to ascertain whether he was killed under such provocation or acts upon the part of the deceased as rendered his killing lawful. You will go, in mind, gentlemen, to the scene of death, and look at it, as it passes before you, in the blended light of law and facts. What was the deceased doing at the time of the killing? What act did he do, that is proven before you, that justifies the killing under the law of self-defense just laid down? *I say acts*; for provocation by words, threats, menaces or contemptuous gesture shall in no case be sufficient to free the person killing from the guilt and crime of murder.

In coming to a conclusion, you will scan the testimony closely. We have nothing to do with witnesses not produced upon the stand—the State is not bound to produce all her witnesses—and the rule of best evidence does not apply. We deal only with the case as proven, and if the defense of

the accused arrises out of the evidence of the witnesses for the prosecution, it enures just as much to his benefit as by the introduction of witnesses; in a word, gentlemen, the case stands on the evidence introduced, and from that alone you will decide upon it.

I charge you that the statement of witnesses, when unimpeached cannot be capriciously set aside. Relationship goes to the credibility of the witnesses only. And when witnesses are in conflict the jury may look to relationship as well as to other facts, to decide the question of credibility; but the testimony of a witness not impeached cannot be rejected on the ground of relationship. You, gentlemen of the jury, will look to the evidence, and if you find conflict, then apply the rule relative to credibility laid down. But if there is no conflict the rule laid down will govern you. On the question of conflict, gentlemen, in response to a request, I charge you that a man swearing he saw a pistol and another that he did not, does not make such a conflict in the statement of witnesses as authorizes you to set aside either. You will take the opportunity of both and reconcile them, and failing in that give credence to a positive witness over a negative one. If you believe from the evidence that Stephen Winn came to his death at the hands of the prisoner, by a *pistol shot*, under the rules of law laid down, and you believe further, from the evidence, that, at the time of the killing, Winn was in the peace of the State, and that such killing was not absolutely necessary to save his, the prisoner's, own life, or that it was not absolutely necessary to prevent such an attack as I have already referred to, and to prevent such attack and invasion, and that a serious injury was not intended, or might accrue to the prisoner's property or family, and that the killing was done with deliberate intention, and there was no considerable provocation, and the circumstances of the killing show an abandoned and malignant heart, and you believe this, gentlemen, beyond reasonable doubt, then it will be your duty to find the prisoner guilty of murder.

But if, on the other hand, you believe that Winn did not come to his death at the hands of the prisoner, by a pistol shot, under the rules of the law laid down, or if you believe that it was absolutely necessary to save the prisoner's own life, or that it was absolutely necessary to prevent such an attack as has been read to you from the section 4266 of the Code, or if you believe that there was considerable provocation, and there was no malice, express or implied, in the killing of Winn, the deceased, or if you have reasonable doubts these facts, then you will not find him guilty of murder. In coming to your judgment you will be governed by the evidence of the case. See the case only by the evidence. All appeals and eloquence of counsel are intended to present in a forcible manner the various sides of their case, and are entitled to consideration as far as they apply to facts proven or illustrations invoked, to give them strength; all matters outside of this are not to be considered by you in making up your verdict.

It matters nothing to you what previous history may be invoked, or what criticisms or eulogiums may be expressed—matters not what other crimes may have been committed in this country, or what other juries may have done or failed to do, what policy may demand of the country, what has been said or may be said about your verdict, what influences may be invoked to excite your feelings or sympathy or otherwise—I tell you, gentlemen of the jury, to do justice, though the heavens fall. Throw aside everything but your oath and the facts of the case and the law of the case. If you believe beyond reasonable doubt that Wheeler killed Winn, what was Winn doing to him when he done it. Now, stop right there, and go through the testimony carefully and conscientiously. I have read you the law—see if he did anything that the law read to you recognizes as justification, palliation or defense. You are exclusively to pass upon the facts, and I only invoke from you a full and deliberate review of the evidence, applying the law given you in charge.

Much has been said, gentlemen, about your being the judges of the law and fact. I have given you this in charge. You are judges of both the law and the facts, and if you differ, gentlemen, with the Judge, conscientiously as to the law, it is your duty to differ with him. But, gentlemen, the law I have read to you is the *law of Georgia*, from the Code of this State, and about this law there can be no difference between me or you.

In this case I have limited myself to the law of Georgia. I give you that in charge. So far as any opinion upon that law is offered by me, you have the right, and it is your duty, as laid down, to differ with me. But as to the law itself, you are bound by it, as the law that governs you in this case. Apply it to the facts. And right here, gentlemen, I read you the 4259th section of the Code. If you find that that this is not murder, under the facts and law, then it becomes my duty to call your attention to the law further to be considered: 4258—"Manslaughter is the unlawful killing of a human creature, without malice, either express or implied, and without any mixture of deliberation whatever; which may be voluntary upon a sudden heat of passion, or involuntary in the commission of any unlawful act without due caution and circumstances." And if you believe, gentlemen of the jury, that the evidence in this case shows that the killing was, by the prisoner, without malice, either express or implied, that it was done without the deliberation mentioned in the law, but that it was done upon a sudden heat of passion, then, gentlemen, it becomes my duty to explain what acts reduce a homicide to voluntary manslaughter.

To reduce the crime to manslaughter, there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious injury upon the person killing, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied. The offense of voluntary manslaughter consists in the want of consideration and want

of malice, and arising upon sudden heat of passion. The Code defines what may justify such passion, and I charge you that you must be satisfied, from the evidence, beyond reasonable doubt, that there was an actual assault made upon the prisoner by the deceased, or that deceased attempted to commit some serious personal injury to him. The words equivalent circumstances, are left to the jury to say whether anything transpired which was equivalent to the assault or the attempt to do a serious injury, in its sudden startling of passion, which might overrun the channels of reason and overflow the mind with sudden impulse and emotion, shutting out the effort of judgment to deliberate or act with malice. Now, the Code puts a limitation, as a negative, on our action in construing what will not be equivalent, for it says, "provocation by words, threats, menaces, or contemptuous gestures, shall, in no case, be sufficient to free the person killing from the guilt and crime of murder."

And I charge you that you must be satisfied that the killing was the result of sudden and violent passion, excited by something *which he did*, equivalent to an assault or attempt to do the prisoner some serious personal injury. The law has laid down the general rules and defined the offenses growing out of homicide. I have, thus far, given you the law of murder and voluntary manslaughter, and the law of self-defense. It is left to present to you the law of involuntary manslaughter. Section 4261: "This consists in the killing of a human being, without any intention to do so, but in the commission of an unlawful act, or a lawful act which might, probably, produce such a consequence, in an unlawful manner."

If you believe the facts of this case do not make murder or voluntary manslaughter, under the law, then, gentlemen, you will look further to ascertain if this is a case of involuntary manslaughter. In other words, gentlemen, if you believe that the prisoner killed Winn, and that it was done without any intention to do so, then you will go further to ascertain

as to whether the act was lawful or unlawful, under the circumstances under which it was done; for the law says, provided, always, that when such involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a riotous intent, or of a crime punishable by death, or confinement in the penitentiary, the offense shall be deemed and adjudged to be murder.

Another matter, gentlemen of the jury, I am called on, in argument, to give you in charge, is the effect of drunkenness. Drunkenness is no excuse for crime; but if you believe, from the evidence, he was drunk at the time, and he had such provocation as the law recognizes, the fact that he was drunk may be considered in making up your verdict; but, before the law applies, there must be such provocation as the law recognizes.

This case is in your hands; you have nothing to do with the prejudices of the case. It is your duty, on your oath, to take only the case as it has been proven—decide it upon the testimony. Stand between the State and the accused, looking neither to the right hand nor to the left, but start on the line of duty, boldly looking forward to reach the truth. Pause and consider well; for, in the application of the law to the *truth*, you will reach justice and judgment. To know the truth, you are clothed with the power of examination, and I have given you the law; take it to your room and closely investigate the whole matter, and find a verdict according to your judgment and conscience, upon the law and facts."

In charging the jury, he not only read from his written charge, but also reread from the Code, sections 4264, 4265. The jury having been in their room a short time, asked the Court to explain to them again the difference between voluntary and involuntary manslaughter, which he proceeded to do, and did not only explain such difference, but also the difference between manslaughter and murder, by reading to the

ary sections 4258 to 4261, of the Code, omitting the parts rescribing the penalties, all without the consent of prisoner, ough the prisoner and the counsel were present in Court, d interposed no objection. The jury returned a verdict of ilty of voluntary manslaughter, and immediately thereafter e foreman informed prisoner's counsel and the Court that was the unanimous desire of the jury to recommend the isoner to the mercy of the Court, and that they would ve included the recommendation in their verdict, if they d thought they were authorized to do so. The Court then journed until another day, with the announcement that, on t day, sentence would be passed on Wheeler.

Upon the reassembling of the Court on said day, Whee-'s counsel moved to arrest the judgment, upon the grounds t the certified record from DeKalb county did not show y legal ground for changing the venue, nor that a legal y could not be obtained in DeKalb county, nor that heeler's counsel and the Solicitor General could not agree on the county to which to transfer the case, and against written protest of prisoner, (this protest does not appear the record); and because the Clerk of DeKalb had not it up as part of the record, a copy of the evidence used on committing trial. This motion was overruled. Counsel n moved for a new trial, upon the following grounds: 1. Because of the refusal to set aside the order of removal Fulton county, on the grounds taken aforesaid. 2d. Be-se of the refusal to hear argument on said last mentioned tion. 3d. The overruling the demurrer as to the juris-tion in Fulton county, on the grounds stated in that de-rrer, and in overruling said several pleas to the jurisdic-n of Fulton Superior Court. 4th. The overruling of the allenge to the array, on the grounds stated aforesaid, and challenge for cause as to the two jurors whose names re not in the jury box of Fulton county, and to the others o were not of the original pannel as aforesaid. 5th. Be-se in charging the jury the Judge read part of it, not

from his written charge, but from the Code, as aforesaid. 6th. Because when the jury returned into Court for further explanation as to the difference between voluntary and involuntary manslaughter, the Judge gave that explanation, and also explained the difference between manslaughter and murder, by reading the definitions from section 4258 to section 4261 of the Code, (except the parts prescribing the penalties) without prisoner's consent. (Prisoner and his counsel were present and made no objection.) 7th. Because after so reading from the Code he asked the jury whether they understood the explanation. 8th. Because the charge of the Court was contrary to law. 9th. Because he permitted a part of the record from DeKalb county introduced as evidence by itself; and 10th, because the verdict was strongly and decidedly against the weight of the evidence, contrary to the charge of the Court and the law.

This motion was overruled, and Wheeler was sentenced to the penitentiary for twenty years. Error is assigned upon the said several grounds for new trial.

L. J. GARTRELL; ARNOLD & BROYLES, for plaintiff in error.

E. P. HOWELL, Solicitor General, for the State. As to change of venue: Art. V., sec. 12, Par. 2, Constitution of 1868, and Revised Code, sec. 4593. As to matters in the discretion of the Judge below: 38th Ga., 506; 14th, 6; 26th, 493; 27th, 411; 2 Kelly, 183. In Fulton Superior Court, the change of venue was *res adjudicata*. The order of removal was sufficient: 1 Bish's Cr. Pro., 113, note 1. Order not traversable: 1 Chitty's Cr. L., 201. The transfer was regular: Revised Code, sec. 4593. As to challenge to jurors: 14th Ga. R., 45; 22d, 557; 1st Bish's Cr. Pro., 114, note 1; 26 Ala. R., 52. The reading from the Code, in charging the jury, was right: 12 Ga. R., 329. As to other matters in the charge: 32d Ga. R., 679; 11th, 630, *et seq.*; 24th, 305.

WARNER, J.

When there is no material error in the charge of the Court o the jury which could have influenced their verdict, and hen the verdict is abundantly sustained by the evidence, as n this case, this Court will not be very *astute* in the dis- overy of errors to set it aside, unless they be such as would ave, probably, produced a different result. Looking at the vidence in the record, and after reviewing the grounds aken in the motion for a new trial, we are of the opinion hat there was no error in the Court below in overruling the ame, which will authorize this Court to reverse it; and that he defendant should be well satisfied with the verdict of oluntary manslaughter, and the penalty imposed on him by he Court therefor, under the evidence in this case.

Let the judgment of the Court below be affirmed.

WILLIAM H. WARD, plaintiff in error, *vs.* SARAH F. WINN, guardian, defendant in error.

Where an action was brought by the plaintiff, as the bearer of two promissory notes, payable to W., or bearer, against the defendant, and, on the trial, the defendant offered in evidence his books of account, for the purpose of showing that W., the payee of the notes, was indebted to him for goods and merchandize sold to him prior to the transfer of the notes, (it being admitted that the notes had been transferred by the payee to the plaintiff, after due,) and claimed that the amount of his account should operate as a payment of the plaintiff's debt, *pro tanto*, or be considered as an equitable defense to the plaintiff's action, which books of account were rejected by the Court:

Held, That the fact that the defendant had an account against the payee of the notes, without more, was not a good legal defense against the plaintiff, who was the holder of the notes; to constitute a good equitable defense against the holder of a note received after due, that defense must be, in some way, connected with the debt sued on, or the transaction out of which it sprung; and such equitable defense should be set forth in the defendant's plea as fully in a Court of law as in a Court of equity, if he wishes to avail himself of such defense in a Court of law.

Promissory Notes. Payments. Before Judge ANDREWS. Oglethorpe Superior Court. October Term, 1870.

In October, 1855, Ward made his two promissory notes for $550 00 each, payable to Benjamin V. Willingham, or bearer, on or before the 1st of January, 1857, and 1858, respectively, and delivered them to Willingham. In 1866, Willingham transferred these notes, by delivery, to Sarah F. Winn, as guardian of certain minors. In March, 1867, as such guardian, she sued Ward on the notes. No written plea was filed, but it was agreed that payment was considered as pleaded, and that this plea consisted of a claim by Ward, against Willingham, for goods sold to him by Ward, from 1855, to 1866, inclusive, and because these accounts were long, the setting of them out was waived.

Plaintiff's counsel read in evidence the notes, and closed.

For the defendant, it was admitted, that plaintiff did not get the notes till 1866. Defendant's counsel then offered in evidence his books of original entry, to prove his said accounts against Willingham. Plaintiff's counsel objected to the books upon the ground, that these accounts against Willingham were not payment of said notes, and the books were rejected. No other testimony was offered. The plaintiff had judgment for the amount of the notes.

Ward's counsel say that the Court erred in rejecting the books, because these accounts, made when Willingham held the notes, were as against one who took them after due, payments, *pro tanto*, by operation of law, and constituted equitable defenses against said plaintiff.

W. G. JOHNSON, for plaintiff in error.

TOOMBS & DUBOSE. S. H. HARDEMAN, for defendant.

ARNER, J.

n the statement of facts disclosed by the record in this , there was no error in the judgment of the Court below ejecting the defendant's books of account at the trial: e, 2853.
et the judgment of the Court below be affirmed.

E ORDINARY OF BALDWIN COUNTY, plaintiff in error, . RETAILERS OF LIQUOR IN MILLEDGEVILLE, defendants in error.

n, by the charter incorporating the city of Milledgeville, no express wer is granted to the city to grant license for retailing spirituous uors within the corporate limits thereof:
, That, until such power shall be expressly conferred on the city, e Ordinary of the county, under the general law of the State, has the wer and authority to grant such license; but when an incorporated y has the power and authority expressly conferred by its charter to ant such license, and does grant it, and the fees therefor are as ch as required by the general law of the State, then the Ordinary of e county cannot require a license from those who reside within the corporated town or city for retailing spirituous liquors therein. The press grant to the incorporated town or city to grant the license to tailers of spirituous liquors within the corporate limits thereof, exudes the right of the Ordinary of the county to tax them under the neral law of the State, as retailers of spirituous liquors, when ensed by such incorporated town or city in the manner before ated.

icense. Municipal Corporations. Before Judge ROBIN-. Baldwin County. Chambers. April, 1870.

The Mayor and Council of Milledgeville granted license ertain persons to retail spirituous liquors in Milledge-e, and received from them the license fee usually charged

by them; how much does not appear. The Ordinary of Baldwin county, in which Milledgeville was situate, claimed that the power to charge for and issue such licenses belonged to his office, and that no legal sales could be made till he granted the licenses. The parties agreed to submit the controversy to Judge Robinson. It seems to have been conceded that the Mayor and Council of Milledgeville had for a long time heretofore granted such licenses. And it was not pretended that they had any authority to do so except the power to pass "such ordinances as are essential to the welfare and security of the city, and the preservation of the good order and peace of the same."

Judge Robinson held that the Mayor and Council had the authority claimed by them, and that is assigned as error.

NEWMAN & HARRISON, for plaintiff in error.

I. L. HARRIS, by the REPORTER, for defendants.

WARNER, J.

From the statement of facts as disclosed by the record in this case, the city of Milledgeville has no express authority conferred by its charter to grant licenses for retailing spirituous liquors within the corporate limits thereof. Until such power shall be expressly conferred on the city authorities to grant such license the Ordinary, of the county, under the general law of the State, has the power and authority to grant the same: Code, 1432, 1435. *Sanders vs. The Commissioners of Butler*, 30th Georgia Reports, 679.

Let the judgment of the Court below be reversed.

THE CENTRAL RAILROAD & BANKING COMPANY, plaintiff in error *vs.* JEREMIAH DIXON, defendant in error.

When, in a suit against a railroad company for a physical injury done to the plaintiff by the running of its cars, it was in proof that the plaintiff had been injured by the starting of the cars as he was passing under them after dark, whilst they were temporarily stopped at Gordon, taking in wood and water, the point of his attempted passage not being a public crossing:

Held, That the gross negligence and want of ordinary care on the part of the plaintiff, in thus undertaking to pass under the cars, brings him within section 2921 of the Revised Code of this State, and that he cannot recover, even by proof, that the engineer did not give the usual signal for starting the train, and a verdict against the railroad for damages will be set aside as illegal.

Damages. Railroad Companies. Before Judge ROBINSON. Wilkinson. April Term, 1870.

Dixon brought case against said company for injuries done to him by running its car over him, etc. The evidence showed that, at Gordon, where the road from Milledgeville joins the road from Savannah, the train was standing in the usual place, after dark, taking wood and water. The public road was blocked up by the train, and the train also stood across the usual crossing for foot passengers. Dixon, wishing to cross the track, got under the train for that purpose; this he did twice; the second time the train suddenly moved, and inflicted said injuries upon him. As to whether the usual signal was given before moving, the evidence was conflicting. The train was moved to give way for the Milledgeville train coming in.

The Court read to the jury sections 2921, 2979 and 2980 of the Revised Code of Georgia, and that part of the opinion of this Court in the case of *The Macon & Western Railroad Company vs. Johnson*, 38*th Georgia Reports*, as to said sections, and then charged them as follows: "A railroad company is liable for any damages done to persons by the running of the locomotives, cars or other machinery of such

company, or for damages done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company. No person shall recover damages from a railroad company for injury to himself or his property when the injury is done by his consent, or where the injury is caused by his own negligence. If the party plaintiff, and the agent of the company are both at fault, the plaintiff may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to the party complaining. Applying these general principles of law to this case, if the jury believe, from the evidence, that the plaintiff has been damaged in his person by the Central Railroad Company, or any one in the employment of said company, in consequence of the failure of said company or its employees to have exercised all ordinary and reasonable care and diligence in the running of their cars at the time stated in plaintiff's writ, then the plaintiff is entitled to recover. But if the jury believe, from the evidence, that the Central Railroad Company or their employees did exercise all ordinary and reasonable care and diligence at the time the injury is alleged to have been done to the person of the plaintiff, then the plaintiff is not entitled to recover. If the jury believe, from the evidence, that the Central Railroad Company were without fault on their part, and that the injury alleged to have been sustained by plaintiff was caused by his own negligence, then the plaintiff is not entitled to recover. If the jury believe, from the evidence, that plaintiff and defendant were both at fault, then plaintiff may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to the plaintiff. If the jury should believe, from the evidence, that the plaintiff is entitled to recover damages, it is for the jury to ascertain from the evidence what the amount of damages should be. Damages are given as compensation

or the injury done, and the injury done is generally the easure of damages, where the injury is of a character ca- able of being estimated in money. If the jury believe, rom the evidence, that the injury alleged to have been sus- ained by the plaintiff was not caused by his own negligence, ut that it was caused by the failure of defendant to have xercised all ordinary and reasonable care and diligence, then he jury must endeavor to ascertain, from the evidence, the xtent of the injury, and what would be a suitable compen- ation for the same in money, taking into consideration the xpenses of medical treatment and nursing incurred by the laintiff in consequence of the injury alleged to have been one him; also taking into consideration the age and value f the services of the plaintiff to himself and family before he alleged injury. Where there are conflicts or discrepan- ies in the testimony of witnesses, it is the duty of jurors to ndeavor, if possible, to reconcile such conflict or discrepan- es without imputing perjury to any of the witnesses. If itnesses swear differently in regard to the same things, other ings being equal, that witness is to be believed who has e best opportunity or means of knowing."

And the Court further charged, at request of defendants' unsel: "That, if the evidence shows in this case that ough the Central Railroad Company, the defendant, or its ents, were guilty of negligence, that is to say, if they failed give the signal that the train was about to back, yet if on, the plaintiff, could, by ordinary diligence, have oided the consequences to himself of that negligence, he not entitled to recover from the Central Railroad." The y found for plaintiff $5,000 00 and costs. Defendant's unsel moved for a new trial, upon the grounds that the rdict was contrary to evidence, etc.; that the Court erred charging the law as to when both parties are at fault, thout qualifying it by saying that, if plaintiff could, by exercise of ordinary care and diligence, have avoided the cident, then defendant is not liable for damages; and be-

cause the charge is contrary to law, inconsistent and contradictory, and therefore liable to mislead the jury. The motion was overruled, and error is here assigned on each of said grounds.

W. K. DEGRAFFENREID; JACKSON, LAWTON & BASSENGER, for plaintiff in error.

JAMES C. BOWER, J. G. OCKINGTON, A. REESE, for defendant. As to new trials: 1st Graham & Waterman on N. T., 541, 542, 545, 546; 3d, 1218, 1219, 1366, 1367, and cases cited; 3d, 1260, 1261, 1262, 1263, 1290, 1291, and cases cited. As to ordinary care: Story on B., sec. 11, sec. 17, note; 2 Am. R. R. Cases, 114 *et seq.;* R. Code, section 3667; Hilliard on N. Trials, 64; Ga. Decisions, 82; Dudley's Ga. R., 182; 4 Ga. R., 193; 20th Ga. R., 511; 6th, 276.

McCAY, J.

In the case of *Johnson vs. The Macon & Western Railroad Company*, reported in 38th Georgia, 433, this Court held that section 2921 of the Code applied as well to railroads as to individuals. That section provides, that if the plaintiff, by the exercise of *ordinary care*, could have avoided the consequences to himself of the *defendant's negligence*, he cannot recover. Ordinary care is defined by section 2034 of the Revised Code to be that care and diligence which a prudent man exercises in his affairs.

Can it for a moment be contended that the act of the plaintiff, in attempting to *crawl under* the cars, only temporarily stopped, as he knew they were, was the act of a prudent man? It was, in fact, a most *imprudent* and *rash* act, and if section 2921 of the Code is to have *any force at all*, we think this case comes clearly under it. By the common law, if the plaintiff contributed, at all, by his negligence, to the injury, he could not recover. Our law does not go so far as this.

He must be guilty of want of ordinary care in order to lose his right to recover. If he be negligent, but the negligence does not amount to want of ordinary care, then, if the railroad company be also negligent, the jury shall apportion the damages according to the negligence of both parties. We place this case on the ground that the attempt to crawl *under* the cars showed a want of ordinary care, so as to bring the plaintiff within section 2921 of the Code.

Were the case otherwise, we should hesitate to disturb the verdict, though the evidence strongly preponderates against it, on the question of blowing the whistle. And, though the verdict is very large, considering the proof, we are very reluctant to interfere where the case is one turning wholly on the facts.

We are of the opinion that if the whistle was not, in fact, blown, there was *some* negligence on the part of the defendant. It is a fair presumption, that the usual customs of the road will be complied with. This does not, however, excuse the rashness of the plaintiff in putting himself under the wheels of the cars, which he had every reason to expect would move, almost immediately, since, according to the habit of the cars, the stoppage was but for a very brief period. We sympathize deeply with the plaintiff in his misfortune, but we cannot make the statute a nullity in furtherance of our feelings.

Judgment reversed.

THE GEORGIA RAILROAD & BANKING COMPANY, plaintiff in error, *vs.* ROBERT J. WYNN, defendant in error.

An action was brought by the plaintiff against the defendant to recover damages for the homicide of his wife, alleged to have been caused by the negligence of the defendant in the running of his engine and cars at the crossing of a public road over the defendant's railroad, and there was a special demurrer to the plaintiff's declaration, on the

grounds: 1st. Because it is not alleged that the homicide, for which damages are claimed, was caused by *collision* with the engine or cars of defendant. 2d. Because the husband has no right, under the common law or statute law of Georgia, to maintain an action to recover damages for the homicide of his wife. The Court overruled the demurrer on both grounds, and the defendant excepted:

Held, That the defendant is liable for an injury done to the person or property of another at a public crossing on his road, by the running of his engine and cars, resulting from the negligence of his agents and servants to blow the whistle of his engine or locomotive, as required by the 742d section of the Code, although there is no actual *collision* of the engine and cars with the person or property injured by such negligence, in all cases in which the plaintiff is entitled to sue for and recover damages under the law, for the alleged injury of which he complains, resulting from such negligence of the company, and that this ground of demurrer was properly overruled.

By the common law, the husband could not maintain an action to recover damages for the homicide of his wife, and, by the provisions of the Code of this State, authorizing damages to be recovered for *physical* injuries done by one person to another, the right to recover damages for a homicide is limited to a widow for the homicide of her husband, or if there is no widow, then the child or children may recover damages for the homicide of the husband or parent; but the Code does not give the right to the husband to recover damages for the homicide of his wife. If the Legislature had intended to have changed the common law rule on this question, it would have done so when declaring the particular class of persons, who were entitled to recover damages for homicide, in the 2920th section of the Code. The Court below, therefore erred in overruling the second ground of demurrer to the plaintiff's declaration.

Husband and Wife. Damages. Railroad Companies. Before Judge ROBINSON. Morgan Superior Court. September Term, 1870.

Wynn brought case againt the Georgia Railroad & Banking Company, making the following averments: On the 18th of July, 1869, defendant was running over its road a "pay-train," without a schedule and without notice to the public. Plaintiff's wife was traveling in a carriage, drawn by mules, unaccustomed to seeing steam engines; she asked when the train would run over the portion of the road along her route, and was told that there would be no train for three hours.

After going about three miles, and while crossing the railway, at a public crossing, said "pay-train" came suddenly round a curve near the carriage, frightened the mules, and they ran away and so hurt his wife that she died of her injury. The whistle of the engine was not blown, as required by law, nor were there any blow posts there, as was required by law. Had the whistle been so blown, the damage would have been prevented.

By reason of this injury, plaintiff was deprived of the comfort and society of his wife, and of her aid and assistance in the management of his domestic affairs, and care and education of his children, and he was obliged to lay out and expend $1,000 00 in attempting to cure her and in furnishing her with attendance and nursing during her consequent sickness, and other money, say $1,000 00, about her burial expenses.

The declaration was demurred to, upon two grounds: 1st. Because it is not averred that said injury was caused by collision with the engine or cars of said defendant, and the statute gives no right of action, unless the injury comes from such collision, caused by negligence or carelessness of defendant's agents. 2d. Because a husband cannot recover damages for the death of his wife. The Court overruled the demurrer and that is assigned as error.

BILLUPS & BROBSTON; A. G. FOSTER, for plaintiff in error.

REESE & REESE; T. G. LAWSON, for defendant.

WARNER, J.

There was no error in the judgment of the Court below in overruling the first ground of demurrer to the plaintiff's declaration, as set forth in the record. After the most diligent search, we have not been able to find a single case in which it has been held, that, by the common law, a husband could

maintain an action to recover damages for the homicide of his wife. In Baker vs. Bolton, 1st Campbell's Reports, 493, Lord Ellenborough said, "In a civil Court, the death of a human being could not be complained of as an injury; and, in this case, the damages, as to the plaintiff's wife, must stop with the period of her existence." This declaration of Lord Ellenborough, coupled with the fact that no such case can be found in the Reports, or cited in the elementary books, furnishes almost conclusive evidence of the rule of the common law upon that question. The 2920th section of the Code, providing for the recovery of damages for physical injuries, *limits* the right of recovery to a widow, or if no widow, then to the child or children, for the homicide of the husband or parent. If the General Assembly had intended to have altered the common law so as to give to the husband a right of action to recover damages for the homicide of his wife, they would have so declared when providing for the particular class of persons specified in the Code. In our judgment, the Court below erred in overruling the second ground of demurrer to the plaintiff's declaration, as specified in the record.

Let the judgment of the Court below be reversed.

MOSES F. FOSTER, plaintiff in error, *vs.* CHARLES M. COPELAND, defendant in error.

Where a bill was filed by the complainant, praying for an injunction to restrain the sale of the land on which a church had been erected, and, after hearing the parties, the Judge refused the injunction:

Held, That, on the statement of facts contained in the record, this Court will not control the discretion of the Court below in refusing the injunction.

Injunction. Before Judge ROBINSON. Green County. Chambers. December, 1870.

Foster *vs.* Copelaad.

Foster, by bill against Copeland *et al.*, sought to enjoin hem from the sale of New Hope Baptist Church, in said ounty, upon the following averments: In 1805, one Daniel xecuted to one Fielder a deed, conveying to him, as trustee f said New Hope Church and his successors in office, certain hree acres of land. The congregation at once built a church pon said land, and continuously occupied it. In 1843, one ohnson, who owned the contiguous, surrounding land, sold is land to one Cardwell, and before Johnson had made a eed to Cardwell, they got into a law-suit as to the titles to ohnson's land. It was rumored that Cardwell contended hat the said three acres were covered by his purchase from ohnson. This put Foster and others, members of said hurch, upon inquiry. They found that Daniel and Fielder ere dead, and that the deed from Daniel to Fielder was ost, and had never been recorded. They communicated these acts to Johnson, who said if they would have six acres around aid church surveyed, he would give a quit-claim deed thereto. 'his survey was made, and on the 15th of December, 1847, ohnson made such quit-claim deed to Foster, for the use of aid church. Since this deed was made, Foster, with the nowledge and tacit consent of the church, has protected and reserved the property, and kept the keys.

There are fifty-seven members of said church. On the 6th of November, 1870, fourteen of its members, named, onfederated to sell said church and convert the proceeds to heir private use, and assumed to empower said Copeland to ell the church. No notice of these proceedings were given o Foster, and others opposed thereto; nor did Foster and his llies take any part in these proceedings, except to protest gainst them as illegal and fraudulent. Under this assumed uthority, Copeland, as trustee of said church, has advertised said building and six acres of land for sale, to the highest bidder.

Copeland answered as follows: Foster had never been recognized as trustee of said church, but has had possession, as

sexton, and was paid an annual salary as such. Finding the church without a trustee, forty named persons, representing the church, petitioned the Judge of the Superior Court to appoint a trustee. He refused, because he held that the congregation could appoint one. Thereafter, in November, 1870, it being the regular conference day and meeting, when all matters pertaining to the church are attended to, the parties present elected Copeland such trustee, as Fielder's successor. But sixteen members were present, and but fourteen voted for Copeland; but that was a larger number of members than usually attended such meetings of the church. The large majority of the members are in favor of Copeland's trusteeship, and so far as Copeland knows, none but Foster and family oppose it. His election was certified and recorded in the church books, and in the books of the Superior Court of said county. He was going to sell said property, under authority granted at said meeting, by a regular proceeding, under the rules of said church, requiring him to sell or cause to be sold the old meeting house and land and property belonging to the same, and to invest the proceeds "in the new meeting house, now being built, near," etc. He was *bona fide* proceeding for said purpose, and a large majority of the church were in favor of the new church building, and of selling this one to help pay for that.

The record does not show how this matter got before the Chancellor. When it came on for hearing, he held that Copeland had the right to open and conclude the argument. On the hearing, Foster made affidavit to the facts stated in his bill, and several other members of the church made affidavit to the averments of the answer, and that the election and authority of Copeland was done regularly, and according to the rules of said church. The injunction was refused. Foster says the Chancellor erred in refusing him the right to open and conclude the argument, and in refusing said injunction.

A. G. & T. C. FOSTER; J. HILL, for plaintiff in error.

ROBINSON & BRANCH, for defendant.

WARNER, J.

On the statement of facts contained in the record of this case, this Court will not control the discretion of the Court below, in refusing to grant the injunction prayed for in complainant's bill.

Let the judgment of the Court below be affirmed.

SOLOMON COHEN, plaintiff in error, *vs.* JOHN E. WARD, defendant in error.

An action was brought by the plaintiff against the defendant, to recover damages for a breach of an implied warranty of title to fifty shares of Central Railroad stock, alleged to have been sold by the defendant to the plaintiff in the month of April, 1863, and on the trial, it appeared from the evidence in the record, that the defendant sold to or exchanged with the plaintiff, one hundred shares of Central Railroad stock for $20,000 00 of Confederate States eight per cent bonds. The contract was consummated between the parties, by the delivery and transfer of the railroad stock to the plaintiff, and the delivery and transfer of the Confederate bonds to the defendant, in pursuance of that contract; but the defendant did not have the title to fifty shares of the railroad stock transferred by him to the plaintiff, the title thereto being in other parties. The jury, under the charge of the Court, found a verdict for the plaintiff for $2.000 00 in gold. The defendant made a motion for a new trial on several grounds of error alleged, as to the charge of the Court to the jury, and as to refusals to charge as requested, and because the verdict was against the law and the evidence. The Court overruled the motion for a new trial, and the defendant excepted.

Held, That under the pleadings and evidence in the case, the plaintiff was entitled to recover from the defendant for a breach of the implied warranty of title to the fifty shares of railroad stock sold and transferred by the defendant to the plaintiff under the contract, to which he had no title, and it made no difference under the law of this State,

whether it was a sale of stock for bonds, or a barter, or exchange of stock for bonds.

As this was a Confederate contract, the measure of damages for a breach of the warranty of title to the fifty shares of stock, should have been left to the jury under the provisions of the Ordinance of 1865, to have been decided by them according to the principles of equity as applicable to the contract between the parties.

Although the Court gave in charge to the jury the whole of the Ordinance of 1865; yet, in other parts of the charge, the jury were restricted to the value of the Confederate bonds *at the time the contract was made.* It was error so to restrict the jury; They had a right to consider their value at any time, and render a verdict according to the principles of equity applicable to the contract between the parties.

Barter and Sale. Scaling Ordinance. Tried before Judge SCHLEY. Chatham Superior Court. May Term, 1870.

Ward averred that Cohen was indebted to him $10,000 00, in that, on the 17th of April, 1863, in consideration that Ward would buy from him fifty shares of the capital stock of the Central Railroad & Banking Company for $200 00 per share, Cohen promised that said shares were his, with full power and right to convey it, and Ward thereupon then paid him $10,000 00 and took said stock; but Cohen had no title to said stock, nor right or power to convey it, but it belonged to others, who since claimed and obtained possession of it, whereby Ward wholly lost the same. A second count was for $10,000 00 received by Cohen on said day, to Ward's use.

Cohen pleaded that he agreed to exchange one hundred shares of such stock to Ward's agent for $20,000 00 in the eight per cent. bonds of the Confederate States of America; that he then and there owned three hundred shares, and from it took scrip representing $10,000 00, nominally, but then worth $20,000 00 "in currency," and without examining the dates delivered them to said agent, and he delivered to him said bonds, and did not notice that any of it was sequestrated stock, nor was any inquiry made on that point, nor did Cohen find it out till 1866. By the result of the war the bonds

and sequestrated stock alike became worthless, and the consideration of said contract has wholly failed. If, however, this transaction is to be opened, Ward owes Cohen for the fifty shares of unsequestrated stock and its dividends. And he tendered back said bonds.

On the trial, the evidence was substantially as follows: It was shewn that the company refused to let Ward have but fty of the one hundred shares, because the other fifty were questrated, and the record of the cause touching these fifty sequestrated shares in which this Court held that Ward got o title as to them, was read in evidence See Ward *et al.*, . The Central Railroad & Banking Company, 37th Geora Reports, 515.

Dr. Willis, Ward's said agent, then testified that he knew of e purchase of certain shares of Central Railroad stock by the aintiff from the defendant, in the spring of the year 1863. e made the purchase for the plaintiff. The price of the ocks was about $200 00 per share—perhaps five or ten per nt. more. Payment was made in Confederate States eight per nt. bonds, and witness thinks $21,000 00 or $22,000 00 in nds were given for one hundred shares Central Railroad ock. The payment was made in bonds at the instance of e defendant. Thinks in the market they commanded a all premium; but how or where they were procured, witss cannot remember. There was a difference in the value Central Railroad stock which had been sold at sequestran sale and that which had not, the sequestration sale being lower prices than that sold as non-sequestrated stock, at ivate sale. At the time of the sale nothing was said about e stock having been sequestrated or not having been sestrated; for witness never suspected its having been sestrated. Witness' connection with the transaction ceased ith its consummation, and he knew nothing of it afterwards. He was asked to state whether the following is not a corct history of the whole transaction, or how otherwise: That n came into Mr. Cohen's office and asked if he would sell

any of his Central Railroad stock; that at first he refused, but, after a while, he said, 'Well, I will transfer one hundred shares of my stock, if you will give me $20,000 00 in bonds;' that to this you agreed, and you and Mr. Cohen were to meet at the bank; that, when you came, you brought the bonds, and a paper on which you had calculated the interest, and demanded that in currency; that Mr. Cohen refused this, saying he would pay no interest unless he received payment for the accruing dividends; that you went off to consult Mr. Ward, returned, and abandoned the claim of interest; that Mr. Cohen handed you the scrip, signed by the President and Cashier, and received from you the bonds;" the witness said: "The narration of facts embraced in this interrogatory is very much in accordance with my recollection, except as to the incipiency of the transaction. I think that it was in this wise: The defendant and I were Directors of the Bank of the State of Georgia, and one morning after the Board, conversation turned upon the prices of stocks; and during the conversation, I offered defendant $200 00 per share, for one hundred shares of Central Railroad stock. He said he would give an answer within an hour or two, and during the morning I called at his office and was informed that he would sell, payable in Confederate eight per cent. bonds; but the price finally agreed I cannot recollect. Mr. Cohen did not say anything to mislead me as to the kind of stock he would transfer; nor did I ask him any questions. I could have questioned him, and I have no doubt he would have answered truthfully; and I would have done so, had there been anything to excite apprehension as to the kind of stock he would transfer.

Abraham Backer, of New York City, testified: On or about the 10th of April, 1863, defendant stated that he had recently sold to the plaintiff one hundred shares of the Central Railroad and Banking Company stock, at two for one, and was anxious to invest the funds he had received upon that

sale. Witness asked him if it was confiscated stock which he had sold to the plaintiff. Defendant replied no; it was his own old stock. Witness told him he was astonished that he would sell his old stock. Defendant told witness he had received of the plaintiff two dollars for one on the par value of said stock, but he did not mention in what sort of Confederate money or securities such payment had been made. Witness' belief is that two for one was at the time a fair market value for Central Railroad stock. Confiscated Central Railroad stock, to the best of witness' recollection, was then selling for $125 00 to $130 00 per share, Confederate money. Witness' information is derived from his having dealt in Central Railroad and other stocks in the Savannah market at that time, and from his personal knowledge of the values, at the time, of this and other stocks.

Thomas M. Cunningham, Cashier of the Central Railroad and Banking Company of Georgia, being sworn, produced the transfer book of said company, showing that on 17th April, 1863, defendant caused to be transferred to plaintiff one hundred shares of the capital stock of said company, in one scrip or certificate of stock, the par value of which stock was $100 00 per share, and that the transfer was from two scrips—each for fifty shares—standing in the name of defendant, and that fifty of said shares were for sequestrated stock. He further testified that, after the war, say ..... day of ....., 186..., Mr. Saussy, with power of attorney from plaintiff to that effect, applied to said company to transfer the said one hundred shares to George S. Owens, Esquire, which proposed transfer said company refused to allow, except as to fifty of said hundred shares, on the ground that the other fifty shares were sequestrated stock, the title to which was not in plaintiff.

On the cross-examination, witness stated that, on the 4th day of September, 1862, there were transferred, on said books, one hundred shares of sequestrated stock, to Octavus Cohen, by the Confederate States Sequestration Receiver.

On the 10th of September, 1862, fifty of those shares were transferred to defendant by Octavus Cohen, and on same day, defendant transferred fifty good shares to Mr. Webber. Witness further stated that, as he believed, there was, at the time, a slight market difference between the value of sequestrated and non-sequestrated stock; the precise difference he did not know; that Confederate States Treasury notes were then the only currency; that such currency had a capacity to purchase Confederate States eight per cent. bonds, and that said bonds then commanded a premium, the precise extent of which he did not know. He further testified, that after the Central Railroad and Banking Company of Georgia first began to declare dividends, some years before the war, it continued so to do until December, 1864, when it ceased to do so until December, 1866—the dividends, when declared, being always equal to the legal rate of interest, and generally at the rate of five per centum for six months. He further testified that, after, as before, said company began to declare dividends, its stock was generally at par; sometimes considerably above par; that, at the time of testifying, it was about $118 00; and, since the war, has been as high as $134 00. He further testified that, in 1863, gold was a commodity, rather than a standard of value; but that he considered stock in the said company equal to par during the war, and more than par after December, 1867. Witness verified Barber's table of the value of Confederate money, as contained in the 34th Volume of Georgia Reports, as generally correct, in his opinion. Witness stated, further, that sequestrated stock was traceable as such, though not always easily.

Plaintiff also proved that, on the 12th day of April, 1866 gold was worth from $138 00 to $140 00, as compared with currency of the United States.

Solomon Cohen, the defendant, being sworn, testified that, the testimony of Willis was, in the main, correct, although he seemed not to remember the details exactly; but that Abra-

oker's testimony was a tissue of falsehoods; that he ad any such conversation with Backer, as the latter

Dr. Willis asked witness (Cohen) to sell one hun- ares of Central Railroad stock, at two for one; at first, refused, but he afterwards agreed to transfer one d shares of said stock for $20,000 00 of Confederate ight per cent. bonds; that to this he agreed. Witness . Willis met, by appointment, at the Central Railroad -he to deliver the bonds, and witness to transfer the At this meeting at the bank, Willis handed witness r, on which was a calculation of interest, and asked payment in currency. Witness said, "No, if I pay e accrued interest on the bonds, you must pay me the ly accrued dividends on the stock; it must be a clean ' Willis then said he must go and consult with Mr. . It was then the first time witness knew Dr. Willis rchasing for another and not for himself. Dr. Willis ed to the bank, withdrew the claim for interest and witness the bonds; whereupon witness transferred the Mr. Ward, and handed to Dr. Willis the scrip for the red shares. At that time, and until after the war, id not know that any of the stock transferred to Mr. been sequestrated. No questions were asked; and, illis had desired information on the subject, he have obtained it. Witness then owned between ur hundred shares of the stock; and that he took box scrip for one hundred shares, without look- dates, or investigating whether any had been or not; for, as far as he knew, there was, at that rence, in the market value, between sequestrated estrated stock. Later in the war, there was a not such difference as stated by Backer. Dr. ess thought, said there was a small difference. en he transferred the stock to Ward, witness' t ; the failure of the Confederacy rendered the es bad, under the decisions of the Courts, but

the same cause rendered bad and of no value the bonds witness received from Mr. Ward in exchange for witness' stock. He gained, by the trade, at least $5,000 00; witness lost all. The transfer to Mr. Webber, (mentioned by Mr. Cunningham in his testimony,) was for Octavus Cohen, who repaid witness [by the] fifty shares of sequestrated stock, transferred to Mr. Ward, and who made the transfer of such sequestrated stock, as stated by Mr. Cunningham. On their face, the bonds were clearly illegal, as showing that they were issued for war purposes. Witness retained the bonds thus exchanged; and, except the coupons, which must have been collected, witness lost all. He further stated, that, although he had the bonds still, he could not swear to their identity, amongst others he had of the same kind. He had given some of that kind away, in Europe and in this country, as curiosities.

On the cross-examination, witness stated that he did not know that the Confederate States eight per cent. bonds were at a premium at the time of the trade; later in the war, they were. He did not now know what the price of gold was at the time of the trade. Witness was no speculator in gold, or any other thing. During his stay in Europe, in the years 1867 and 1868, his exchange cost him from $135 00 to $151 00. He knew of no difference in value, between eight per cent. bonds and currency, at the time of the trade. He had, as already stated, exchanged fifty shares of original (or non-sequestrated) stock for the fifty shares of sequestrated stock transferred to Mr. Ward.

The evidence here closed. At the conclusion of the argument, counsel for defendant presented, in writing, to the Court the following requests to charge:

1st. That if the jury find, under the evidence, that this is not the case of a sale, but of exchange or barter, the plaintiff cannot recover, the variance between the allegation and proof being fatal; that a plaintiff cannot sue on one contract and recover on proof of another contract.

2d. That if they find, under the evidence, that it is a case

sale and not of barter, the rule of damage is what the intiff paid, with interest.

3d. That if the jury find, under the evidence, that payat was made in Confederate bonds, and that Confederate nds were issued to aid the rebellion, it is, in law, no payat; Confederate bonds, if issued for that purpose, being gal and void, cannot be a valid consideration for the conct of warranty, or for any contract.

4th. That if the jury find that the bargain was made for nfederate bonds, then the trade between the parties was gal and cannot be enforced.

5th. That if the jury find, under the evidence, that it is a e of exchange or barter, then there was no warranty of le, and the plaintiff cannot recover.

6th. If the contract was not tainted with illegality, then, der the laws of Georgia, the jury should find the value ren on either side, and if Cohen's stock was worth more in Ward's bonds, they should find the balance due on the ole transaction to Cohen, if the contract was entire and t divisible.

The Court charged as follows: 1st. The first question of w is upon the warranty of title, and under our Code is in bstance: "That in all cases of the sale of personal property, less there is an express exception, or, from the nature of e transaction, there is an exception, the seller warrants to e buyer that he has a valid right and title to sell, and that gives a good title to the purchaser. That if the title to ch property is not good and valid, and the purchaser losses e property from a defect in the title, the seller is liable the purchaser for the damages sustained." Now should u find that Mr. Cohen sold to Mr. Ward any number of ares of the Central Railroad stock, as alleged in plaintiffs claration, I charge you that he warranted the title to such ock unless the defendant has shown to your satisfaction by e proof adduced, that this sale falls under one of the exptions of the law, wherein a warranty is not implied. Just

here, as I have seven requests from the defendant to charge you in this case, I will take take them in their order. (He read the first request.) The plaintiff's action is for damages by reason of the alleged failure of title to fifty shares of Central Railroad stock, sold to him by defendant, and for which plaintiff alleges he paid value. It matters not, in my view of the pleadings, whether plaintiff paid value in money, or currency, or bond, or other thing; if you find that he paid value and the title to the stock has failed, then he is liable. He read 2d request. And I charge you that to be the law.

2d. The second question raised by the defendant is that he received no consideration from plaintiff, because plaintiff gave him *bonds* which were void, had no value, as they had been issued for the purpose of waging war against the United States. It is conceded that had payment been made in Confederate currency, there would have been a consideration, and that plaintiff would be entitled to recover, if entitled to recover at all, the value of the currency. The defendant's request on this point is as follows: (He read request 3d to charge.) I cannot give you this charge as my view of the law. I charge the law in this case to be as follows: That it makes no difference whether plaintiff paid defendant in Confederate bonds or Confederate currency. In one sense both were illegal, both were issued in support of the war waged against the United States Government, but both had a market value in the Confederate States. Our Supreme Court and the United States Supreme Court have held that Confederate currency had a commercial value among private individuals; that it was a medium of exchange, and that, as parties contracted on the basis of the value of that currency, any injured party to such contract has the right to recover, not Confederate currency, but lawful money, to the extent of the value which both parties by their contract, either express or implied, placed on the Confederate currency at the time and place the contract was made. So, I say to you that Confederate bonds had their val-

ue, and if parties agreed on the value of the property and chose to take the market value of these bonds as the standard by which they valued the property sold, I can see no reason why the amounts thus fixed upon by the parties cannot be recovered as the price and value of the thing or article sold. I therefore charge you that this contract is not void because Confederate bonds may have been the consideration given for the stock, if you find such facts in this case. This disposes of the fifth request made by defendants, which is as follows: (He read 5th request.) I am requested to charge you that there is a distinction between a sale and an exchange of property by two contracting parties. I am asked to charge you as follows: (He read 6th request.) While I will not stop to consider what distinctions, if any, may exist between a sale and an exchange as to questions of soundness or unsoundness of the article sold or exchanged, I think that on the question of *title* no such distinction exists. In my view, it matters not whether A sells a horse for $100 00 or takes another horse in exchange, valued at $100 00, so far as the question of *title* is concerned. For when a man puts a piece of personal property on the market, it matters not how he may elect to receive payment, he warrants to the person who takes that property that he has "a valid title and the right to sell."

3d. The third point of defense made is, that plaintiff cannot recover any greater sum than the value of the bonds given at the time and place where the contract was made. This, gentlemen, I charge you to be the law, for it has been so held by the highest judicial tribunal in the United States. The Convention of Georgia, in 1865, adopted an ordinance which is generally known as the Scaling Ordinance. (He read the ordinance.) There have been many cases decided by our Courts under this ordinance, and it was passed to give an enlarged power to juries in settling the rights of parties in just such cases as the one you have now to pass upon, and I say to you that you are to judge of the equities between the

parties to this suit. I have no right to say to you, for instance, that you must find such a value of Confederate bonds, or that you must allow *interest* on the amount you may find from any particular date, or that you must find the value of plaintiff's damages in gold or United States currency. These are for your determination. You must estimate the value of plaintiff's loss and damages according to the equities which, under the proof, you shall find to exist between him and the defendant. (He read plaintiff's 4th request and defendant's 7th request, which do not appear on the record.) I think the correct rule of law is as requested by plaintiff's counsel. This contract is divisible. Plaintiff alleges that defendant warranted the title to one hundred shares of stock and that the title to fifty shares has failed. Plaintiff does not seek to disturb the contract as far as the title has proved valid. He alleges that he has sustained damages to the extent of the price paid by him for fifty shares. (If the title to fifty shares has failed, he has the right to be paid the amount of money he gave for those shares, without reference to the other shares the title to which may be good. The parties fixed the value of the one hundred shares and the defendant cannot now say that fifty shares were worth more than that he then (at the time of the contract) said his one hundred shares were worth.)

The jury found for the plaintiff $2,000 00 in gold, without interest.

Cohen moved for a new trial, upon the grounds that the Court erred in refusing to charge as requested; in charging as he did in the words in brackets in the last clause of the charge; in holding that this contract was divisible, and because the whole charge was contrary to law, and the verdict was contrary to the law and evidence. The Court refused a new trial, and error is assigned on each of the grounds for new trial.

(When the cause was called here, Mr. Cohen said he would not move to dismiss the same here, because that would af-

firm the judgment against him, but asked that if this Court should hold that the Relief Act of 1870 (which requires an affidavit that plaintiff has paid all taxes chargable on certain old demands) ousted the jurisdiction over this cause, they would send the cause back with an order that it be dismissed below. But this Court said that that question had not been made below, and could not be entertained in this cause. The writ of error in this cause was sued out before the passage of the said Act of the 13th of October, 1870.)

W. B. FLEMMING, HARDEN & LEVY, S. COHEN, for plaintiff in error. This was assumpsit, and the declaration contained: 1st, a special count for breach of warranty of title to fifty shares of Central Railroad stock; and 2d, a general *indebitatus assumpsit* count for money had and received by defendant for plaintiff's use. This being a case of *barter or exchange*, and not of sale, the first count of plaintiff's declaration was not available: 2 Chitty, 274, 281. The contract not having been rescinded, the second count was also bad. That this is a case of barter, see the evidence in the record, and the following authorities: Story on Sales, section 218; Comyn on Contracts, 130; Long on Sales, page 1; Code of Georgia, section 2,614; 3 Salk, 157. As the allegations and proofs must agree, the Court below was wrong in its charge to the jury on this point, and should have granted a new trial: 1 Chit. Pl., (edition of 1833,) 325, 326, 327; 1 Camp. Rep., 361. And the contract not having been rescinded, the second count is also bad, and the plaintiff below was not entitled to recover on that: 1 Chit. Pl., 388; 12 Wheaton, 183; 1 Douglas, 183; 2 McCord, 432; 8 Ga. Rep., 71, etc.; 14 Mees. & Wel., 139; Code of Ga., sections 2599, 2683. Section 2610 of the Code is not adverse, for the reason, that this section refers to a total, and not a partial breach of warranty. Being a suit for *breach of warranty*, the action must be *special*. But, even if there be no dis-

tinction, *in pleading*, between a barter or exchange and a sale, (it being manifest there is such a distinction in that, if in no other particular,) still, this was an *entire* and not a *divisible* or severable contract: 2 Parsons on Cont. 517, etc., and cases there cited; Code of Georgia, sections 2599, 2683. If this was an entire contract, then, as a matter of pleading, the Judge not only erred in his charge and his refusal of the motion for new trial on that ground, for the reasons already given, but the tendency of such ruling on the trial was to embarrass the defendant, in limiting his defense under the Scaling Ordinance of 1865, and the Relief Act of 1868, page 148. As the bonds became worthless to Cohen, the jury was bound to consider that fact; and the Court below had no authority to limit or qualify that right, as it did repeatedly: 34 Georgia Reports, 485, 556; 35 Georgia Reports, 117; 36 Georgia Reports, 328; Ordinance of 8th November, 1865; 37 Georgia Reports, 361; 38 Georgia Reports, 350, etc.; 39 Georgia Reports, 597 to 605; 41 Georgia Reports, 136; Act of 1868, Pamph., p. 148. The Supreme Court of the United States decided that Confederate States Treasury notes were illegal, but were money from the necessity of the case only. Thorington *vs.* Smith, 8 Wallace. But bonds of the Confederate States were not money or currency and they were illegal. In no event could they have been legal. Their object was to raise money in aid of the rebellion, and that purpose was known to all who received them. Their purpose was stamped on their face and on the law or act under which they were issued. See Chief Justice Chase's decision in Virginia newspaper report; 41 Georgia Report, 331; 82d English C. L. Report, 979; 1 East, 1; 5 Burrows, 2589. Money is the common medium of exchange among civilized nations: *Encyclopedia Americana.* Article money, vol. 8; *Ibid*, vol. 3d. Webster's Dictionary.

THOMAS E. LOYD, JACKSON, LAWTON & BASSENGER, HARTRIDGE & CHISOLM, for defendant. Mr. Cohen, when he sold to Ward the one hundred shares of stock, guaranteed the titles to each and every share of said stock: Irwin's Code, section 2609; 37 Georgia, p. 531. There is nothing expressed in this sale; nor can anything be implied which can take this case from the general rule. The title to fifty of the hundred shares of the stock so sold was worthless: 37 Georgia, p. 515. Cohen was, therefore, responsible for the loss of this stock: 37 Georgia, 531. Whether barter or sale, makes no difference: 38 Georgia Reports, 9091; Revised Code, section 2614. Confederate bonds a consideration sufficient to give legal validity to the sale: 38 Georgia, 469; Thorington *vs.* Smith, 8 Wallace, pp. 1, 7, 11, 12. Dean *vs.* Youngells, Adm'r. Ibid, p. 14; Acts 186, p. 32, Constitution of Georgia, Art. 11, section 12; 39 Georgia, pp. 100, 574. The Scaling Ordinance was read to the jury, and given them in charge by the Judge with instruction, that he had no right to instruct them as to its application; but that they should settle the equities according to the proofs between the parties, and such have been the decisions of this Court: 35 Georgia, p. 118. The contract was clearly divisible, because each share of stock had its individuality, and Mr. Cohen might have received his titles to the hundred shares of stock from an hundred different persons: Code of Georgia, sections 2599, 2600. The contract here is executed, not executory: Story on Sales, 186, section 217.

WARNER, J.

Under the pleadings and evidence in this case, as disclosed by the record, the plaintiff was entitled to recover from the defendant for a breach of the implied warranty of title to the fifty shares of railroad stock sold and transferred by the defendant to the plaintiff under the contract, to which he

had no title, and it made no difference, under the law of this State, whether it was a sale of stock for bonds, or a barter or exchange of stock for bonds: Code, 2614.

The Court below erred in its charge to the jury, in restricting them as to the measure of damages which the plaintiff was entitled to recover, to the value of the bonds at the time the contract was made, or to the value placed on them by the parties at the time the contract was made, in view of the provisions of the Ordinance of 1865: *Evans vs. Walker*, 35th Georgia Reports, 117; *Cherry vs. Walker*, 36th Georgia Reports, 327; *High vs. McHugh*, 38th Georgia Reports, 285. The jury might or might not have believed that the proper measure of damages was the value of the bonds at the time the contract was made, according to the principles of equity applicable to the contract between the parties under the provisions of the Ordinance of 1865. It is true that the Court, in this case, did give the whole of the Ordinance in charge to the jury, but the effect thereof was *practically* neutralized and emasculated by the other objectionable portions of the charge.

Let the judgment of the Court below be reversed and a new trial be granted.

VIRGIL N. CHILDERS, plaintiff in error, *vs.* MELVINA ADAMS, defendant in error.

An action of ejectment was instituted in the name of a trustee of a married woman against the defendant, to recover the possession of a tract of land, the title to which was claimed under a marriage settlement deed. The demise in the declaration was alleged to have been made by the lessor of the plaintiff in the name of the trustee of Melvina Adams, a *feme covert*. During the pendency of the suit, the husband of the *feme covert* died, and on the trial of the case, the Court allowed the declaration, on motion of plaintiff's counsel, to be amended, by striking out the name of the trustee, so as to leave the demise in the name of Melvina Adams as the plaintiff's lessor:

hat, under the provisions of the Code, there was no error in the in allowing the amendment, inasmuch, as on the death of the nd, the legal and equitable title to the land was in the widow, at she could recover in her own name by showing title to the n herself as the plaintiff's lessor.

o shown, by the evidence in the record, that on the 26th June, Bennett Adams and Melvina Brinson executed an ante-nuptial ict, or marriage settlement, by which, all the property she then or might thereafter have, should be her separate estate and prop- the legal title of which was vested in a trustee for the joint use enefit of herself and husband during her coverture, with power l and dispose of the property in any way she might think fit, in ple a manner as if she was a *feme sole*, such disposition of said rty by her to be the written conveyance, or other title papers nay be executed by the trustee named in the deed, with the con- of the said Melvina Brinson, *written and signed by her, upon onveyance, or other evidence of title*, of the said named trustee. marriage settlement was not recorded until the 8th January, 1857. e 12th January, 1857, the trustee named in the marriage settle- conveyed the tract of land in dispute to Mrs. Melvina Adams, gal effect of which, was to vest the title in her husband by virtue marital rights; provided the conveyance had been made by the e in pursuance of the terms of the marriage contract, but the n consent of Mrs. Adams *upon that deed of conveyance*, does not r, as required by the marriage settlement. On the 15th of Janu- 857, Adams and his wife conveyed the land in dispute to Mc-. The evidence in the record shows, that she was coerced to n the deed by the threats of her husband. The land was sold at F's sale as the property of McBryde, and purchased by McGuire, old to the defendant. The evidence in the record shows that ract of land was a part of the property which Mrs. Adams re- l from her father's estate, and was, therefore, a part of the prop- mbraced in the marriage settlement:

hat the deed from the trustee, Ryals, to Mrs. Adams, not having executed in accordance with the terms and manner prescribed in arriage settlement, did not convey any title to her, or to her nd, to the land in dispute, and they not having any title under eed, conveyed none to McBryde; that Mrs. Adams (the coercion r husband being out of the question) did not convey the land in dance with the mode prescribed in the marriage settlement, so as eat her right and title to the land secured to her by its terms and ions. All the parties claiming to have purchased the land under yde's title, done so after the marriage settlement was recorded; any view that we have been enabled to take of this case, from idence in the record, the verdict of the jury was right, under the

law applicable thereto, and we will not disturb it for any of the alleged errors complained of by the defendant.

Ejectment. Married Women. Statute of Limitations. Before Judge CLARK. Dougherty Superior Court. June Term, 1870.

This was ejectment, in favor of John Doe, upon the single demise of "N. P. Brinson, trustee of Melvina Adams," against Childers, tenant in possession. It was begun in November, 1861, and was tried in June, 1870. It was admitted that Reuben Ryals was the common *propositus* of plaintiff and defendant. Plaintiff read in evidence a deed from Ryals to Melvina Adams, her heirs and assigns, made the 12th of January, 1857, and recorded on the 6th of February, 1857. He also read in evidence a deed made the 26th of June, 1848, between Bennett Adams, and Melvina Brinson, and said Ryals, whereby, in consideration of the marriage of said Bennett and said Melvina, about to be solemnized, said Bennett covenanted "that all the property, of whatsoever description, real and personal, that the said Melvina Brinson may now be possessed of, as her own property, or of which she may be, alone, hereafter possessed of, in her own rights, or in the rights of any other person or persons whatsoever, as well that which may be given her by any person or persons whatever, or which may be inherited by her from her father's estate, or any other person or persons whatever, shall form, and remain to be, her separate estate and property, and shall not, in law or equity, be subject to the payment of the debts of the said Bennett Adams, or be subject to be sold or conveyed, or in any manner controlled by him, the said Bennett Adams, only so as to give him the use and benefit of said property during the coverture, jointly with the said Melvina Brinson; but the right and title of said property shall be vested in the said Reuben Ryals, of the third part, for the use and benefit of said parties of the first and second parts. And said Bennett Adams further

covenants and agrees that the said Melvina Brinson may sell and dispose of the said property in any way that she may think fit, in as full and ample a manner as if she were *feme sole*, all of which disposition of said property by the said Melvina Brinson shall be the written conveyance, or other papers that may be executed by the said Reuben Ryals, with the consent of the said Melvina Brinson, written and signed by her upon said conveyance, or other evidence of title of the said Reuben Ryals." This paper was recorded on the 9th of January, 1857.

N. P. Brinson then testified that, Ryals died in 1860 or 1861, and that Bennett Adams died in 1865; that Melvina opposed selling the property to McBryde, and told McBryde and Boynton that it was hers, and that she would not sell it; McBryde and Boynton tried to buy the land from Bennett Adams, and they and witness went to Ryals to get him to convey it to McBryde, but Ryals said he would not make a deed to any one but Mrs. Adams and her children, and he did convey it to her as a portion of her share of her father's estate. Boynton was sheriff, and was pressing Adams with a *fi. fa.* against Adams as security, and he bought the land from Adams and only gave up said *fi. fa.* in payment, and had the deed made to McBryde. After proof, as to rental value, plaintiff closed. Defendant moved for a non-suit, because no title was shown in Brinson, trustee. Plaintiff amended by striking out the words, "N. P. Brinson, trustee of," so as to proceed upon the demise of Melvina Adams. The non-suit was overruled.

Defendant read in evidence a deed from Bennett Adams to Melvina Adams, dated the 15th of January, 1857, to McBryde, recorded on the 10th of February, 1857. It was admitted that the property was sold, at sheriff's sale, as McBryde's property, on the 5th of April, 1859, to McGuire, who, on the 4th of October, 1859, conveyed it to defendant. It was shown that Boynton took possession of the land in 1857 or 1858, and that defendant took possession before the

war, probably in 1859; that Boynton held under McBryde, and held possession till defendant bought the land, and that ever since, defendant held possession. There was other evidence as to rental value.

In rebuttal, Melvina Adams testified to the same that Brinson had sworn; that she was compelled, by her husband's threats to kill her if she refused, to sign the deed; that she told McBryde and Boynton that she was opposed to signing it, and that the *fi. fas.* given up to her husband, in consideration of said deed, were for debts on which he was security before their marriage.

Defendant's counsel requested the Court to charge the jury: 1st. That, in 1857, a deed to a wife vested the property in her husband. 2d. That if Mrs. Adams had a separate estate, her deed to McBryde, taken with the deed from Ryals, was a substantial compliance with the terms of the marriage contract, even if the land was covered by said contract. 3d. That if the land was sold to pay debts against Adams, to creditors who gave him credit before said contract was recorded, the sale was good as to those creditors. 4th. That Mrs. Adams, being *covert* in 1861, could not maintain this suit, unless, under said contract, she had the right to sell or convey. 5th. That if she had the right to sue, she had the right to convey, and the deed to McBryde is good. 6th. That the Statute of Limitations ran in defendant's favor from the time Mrs. Adams had the right to sue, and if defendant had had possession for seven years, she could not recover; and last, that, though *covert*, she could have sued by her trustee, and the declaration shews that she did sue.

The Court refused so to charge. After stating the issue and the evidences of title relied upon, he charged as follows: The land when conveyed to Mrs. Adams, in January, 1857, became her separate estate under the marriage contract, and was held for her use and benefit by the trustee in the contract mentioned, and was subject to all the conditions and limitations in said contract. If the deed from Adams and

wife was made on the part of Mrs. Adams without her free will and consent, but under the restraint and coercion of her husband, with the knowledge of McBryde, it is void. And whether McGuire was bound by the notice to McBryde or not, he was bound to take notice of the provisions of the marriage contract, which was on record, and so was Childers, who bought from McGuire. The record was notice to all the world, not only of the trust estate, but of the limitations of the contract, and they took no title. To entitle defendant to the prescription set up, he must shew seven years adverse possession from the 15th of January, 1857, to the commencement of the suit, and if the suit was brought in 1861, that part of his defense falls to the ground. He also charged as to *mesne* profits, instructing them to give credit for any improvements made by defendant.

The jury found for plaintiff the premises in dispute and $1050 00 for *mesne* profits. Defendant's counsel moved for a new trial upon the ground that the verdict was contrary to the law and evidence, and as to *mesne* profits excessive; because the Court refused to charge as requested, and charged as he did, in that he assumed that this property was covered by the marriage contract; in holding that under this amended demise the suit was brought in 1861; in holding Childers had such notice as to affect him. The new trial was refused, and that is assigned as error. (There was a motion to dismiss the writ of error because the Clerk had not certified that the bill of exceptions was "just as it was received from the Judge," as required by Rule 30 of this Court. See 39th Georgia, 731.) The motion was overruled.

VASON & DAVIS, by R. H. CLARK, for plaintiff in error.

STROZIER & SMITH, for defendant in error.

WARNER, J.

There was no error in the Court below in allowing the amendment of the plaintiff's declaration on the statement of facts in this case, under the provisions of the Revised Code. The verdict of the jury was right under the law applicable to the facts disclosed by the record, and this Court will not disturb it for any of the alleged errors complained of by the defendant.

Let the judgment of the Court below be affirmed.

WILLIAM PETTUS, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

When a requisition is made by the Executive authority of this State for any person as a fugitive from justice, on the Executive authority of another State, and the Governor of this State appoints an agent to receive such fugitive to be transported to this State, it is the duty of such agent, without unreasonable delay, to bring said fugitive before the Governor of this State, (unless otherwise directed), in order that said fugitive from justice may be turned over, under the order and direction of the Governor, to the proper civil authority of the county in which the offense was committed. If the defendant, as such agent, had such fugitive from justice in his custody, for the purpose of transporting him from the State of South Carolina to the Governor of this State, on his requisition, as set forth in the record, without any unreasonable delay, then the defendant was not guilty of false imprisonment in the detention of said fugitive from justice for that purpose, and the Court below should have so instructed the jury.

False Imprisonment. Fugitives from Justice. Before Judge SNEAD. City Court of Augusta. November Term, 1869.

Pettus was tried for false imprisonment of one Kernighan, in the City Court of Augusta, and found guilty. Upon a refusal of a new trial, the case came here for review. But

uestion was passed upon by this Court. Everything in ecord, pertinent to it, is substantially as follows:

October, 1869, one Ruffin made an affidavit before a ice of the Peace in Atlanta, Georgia, charging that Ker- an did, on the 3d of November, 1868, murder Albert G. in, in Richmond county, Georgia. Thereupon, the Jus- ssued a warrant, commanding the sheriffs and constables is State to arrest Kernighan and bring him before said ice, "or some judicial officer of the State, to be dealt according to law." Upon these papers, the Governor eorgia made a demand on the Governor of South Caro- where Kernighan was, asking that he be delivered to us, "who is duly authorized to receive and convey him ıe State of Georgia." He also gave Pettus authority to ve and bring Kernighan "into this State having juris- on of his crime." Upon these papers being delivered to Governor of South Carolina, he ordered that Kernighan elivered to Pettus for said purpose. Kernighan resided lamburg, South Carolina, separated from Augusta, Rich- d county, Georgia, only by the Savannah River. He been arrested, and was in jail at Columbia, South Caro-

He was delivered to Pettus, who brought him to Au- a, and wished to put him upon the train for Atlanta, the of government of Georgia. The crowd interferred and ined Pettus, in charge of Kernighan, from ten minutes half hour. During this detention, Pettus was served ı *habeas corpus*. Next morning he produced Kernighan, e no return, and Kernighan was discharged. It ap- ed that Kernighan was habitually in Augusta, almost r, since the alleged offense.

ettus was tried for false imprisonment. The above facts papers were shown upon the trial. The Judge charged jury that said papers were legal, and authorized Pettus ring Kernighan to Georgia, but that upon reaching mond county, "it was his duty to carry Kernighan be- a Justice of the Peace, or other judicial officer, as soon

as he arrived in Georgia;" that he should "have taken him before some judicial officer for examination, in the county in which the offense is alleged to have been committed," and if he held and detained him "for any other purpose than for examination, (in Richmond county, in this case), his detention was illegal, and the officer (Pettus) was guilty of false imprisonment." "That the requisition of the Governor of Georgia only authorized the prisoner to be brought to Georgia, and that, upon his arrival, he should have been re-arrested and held under a warrant, and his detention, if without a warrant, by Pettus, with the intention of conveying him to a point remote from the place he was in, and where the crime was charged to have been committed, was illegal and without authority of law."

Pettus was found guilty. A new trial was moved for, on the ground that said charge was wrong, because it was Pettus' duty to carry the prisoner to Atlanta, to the Governor of Georgia, and upon other grounds. A new trial was refused, and that is assigned as error on said grounds.

JOSEPH P. CARR, for plaintiff in error.

HENRY JONES, for the State.

WARNER, J.

If the defendant had in his custody, as the agent of the Governor of this State, a fugitive from justice, for the purpose of transporting him from the State of South Carolina to the Governor of this State, on his requisition, as set forth in the record, without any unreasonable delay, then, the defendant was not guilty of false imprisonment in the detention of said fugitive from justice for that purpose, and the Court below should have so instructed the jury on the trial.

Let the judgment of the Court below be reversed.

ON C. ELLINGTON, plaintiff in error, *vs.* JOSEPH B. DILLARD *et al.*, defendant in error.

paper writing was offered for probate and record as the *nuncu-* will of a testatrix, dictated and signed by her during her last ess, thirty days before her death, and attested by two witnesses: That inasmuch as it did not appear from the evidence in the rec- hat the testatrix was *in extremis* at the time of her dictating and ig said paper writing, or that she was prevented by any sudden ise or providential cause, from executing the same in the manner quired by the laws of this State, said paper writing could not be lished as a *nuncupative* will in the Courts of this State. MCCAY, issenting.

ncupative Wills. Last Illness. Before Judge JOHN- Muscogee Superior Court. June Term, 1870.

eon C. Ellington's petition, as the propounder of the hereinafter mentioned as the last will of Violet B. El- n, was filed on the 27th of March, 1869, and contained llowing averments: Said Violet B. Ellington, form- f Columbus, Georgia, died at Lipp Spring, Germany, Kingdom of Prussia, on the 3d of October, 1868; she ed her last will and testament in the presence of three re persons, on the 3d of September, 1868, a copy of is attached; propounder is the person most largely sted in said will. Joseph B. Dillard and others, as at-law of said Violet B., filed their *caveat*, upon the ds: 1st, said paper was not her will; 2d, it was not ed to writing and signed by her in her lifetime; 3d, it attested and subscribed by three competent witnesses; he was a native of Georgia, always domiciled in said nbus, and had left temporarily, *amino revertendi.* At me of making said paper, and at her death all her es- eal and personal, was in Georgia, and therefore could vised only according to the laws of Georgia. The pa- as not made according to the laws of Georgia, in that were not three competent witnesses present when it

was made; she did not bid those present, or any of them, to bear witness that the same was her will; it was not made in her last sickness, nor in the house of her habitation or dwelling, nor where she had been resident ten days or more before making the paper; nor was she then surprised or taken sick, being from home; 6th, the application is not made within six months from the date of her death.

This cause was transferred to the Superior Court by appeal. Ellington amended his petition by averring that Violet B., had been domiciled in Georgia till the 1st of January, 1871, and then abandoned her domicil, went to Berlin, Germany, and was domiciled there for two years; that she made said will and deed, as aforesaid; that said paper was her will, of full force at her death, it being made according to all the forms of law prescribed for making wills at said Lipp Spring; that afterwards, to-wit, on the ..... day of ....., 1869, at Paderborn, in Germany, said will was duly proven and admitted to record, according to the laws of that place; at the time of her death, and of said probate, said Violet B. had, and yet has personalty worth $5,000 00, and many of her legatees reside in said county of Muscogee. And he produced a copy of the records and prayed to probate said paper as Violet B.'s will in said Superior Court.

By yet another amendment he averred that she was a native of Georgia till she was twenty-five years old; that on the 1st day of January, 1867, she left her home, went on a trip to Germany, remained at Berlin two years, went to Lipp Springs, where she was taken sick with a fatal disease, being away from home; on the 3d of September, 1868, she dictated her last will in the presence of three witnesses, and died on the 3d of October, 1868, never having recovered of said sickness, and said will so dictated was reduced to writing within thirty days from said dictation. She had $5,000 00 worth of property in said county of Muscogee. And he prayed the probate of the paper as her nuncupative will. It is well to note that Violet B. is called Isabella in the papers.

On the trial, the propounder introduced and read to the jury a writing, containing certain facts agreed upon by the parties as testimony in said cause, which writing so agreed to and read to the jury, is in letters and figures, as follows, to-wit:

"SIMEON C. ELLINGTON, *propounder of the will of* V. B. ELLINGTON, *vs.* JOSEPH B. DILLARD, JOHN P. DUNCAN *et al.*

"*Caveat to will, in Court of Ordinary of Muscogee county.*

"The following facts are agreed to by all the parties to the above case, and the same may be used in evidence by any of the parties, in any Court where the same may be tried, till the final determination of said litigation, to-wit:

"That the said Isabella Ellington and her sister Annie were natives of the State of Georgia, where they resided till of age. That in the year 1866, they both went to Berlin, in Germany, for the purpose of completing their education, (with the intention of returning to Georgia when their education should be completed,) and for this purpose they remained in Berlin eighteen months.

"That, in June, 1868, the said Isabella being in bad health, went to Lipp Springs, in Germany, and on the 3d day of September, 1868, she was informed by her physician that she had the consumption and could not live long; was then confined to her room and bed, and on the 3d day of October, 1868, she died, having never recovered from said sickness; that her sister, Annie, died before she did. That on the said 3d day of September, 1868, she invited to her room one Spanken and one Sauerland; and one Gertrude Schlosser, who was her female attendant and nurse, was also present, in the same room, during the entire transaction, and then and there, in the hearing and presence of the said three witnesses, she expressed her purpose to make her will; and then and there she dictated the several items in said paper, purporting to be

her will, and the same were then and there reduced to writing by the said Spanken aud Sauerland, who signed the said paper as official witnesses, and the said Isabella then and there signed her name to the same. All of which testamentary dispositions appear upon said writing: That the said writing speaks the truth, with the recitals therein, in reference to the facts therein recited; that the said writing was executed, in substance and form, according to the laws of force in that part of Germany where the same was executed, and, by the laws of that country, would be a good testamentary disposition of real and personal property located in that country; that said will has been proven and admitted to record, according to the laws of that country; that said writing, now of file in the Ordinary's office, may be read in evidence, for what it is worth, and be considered as the original will; that the property conveyed by said will, except the specific bequests in said paper mentioned, consists of lands and railroad stocks, located in the State of Georgia, and also some personal property, not above mentioned, also located in Muscogee county, Georgia."

And thereupon the propounder introduced and read to the jury the said writing, purporting to be the will of V. B. Ellington, with all the recitals therein which is in the words and figures as follows:

PROCEEDINGS HELD AT THE LIPP SPRINGS WATERING PLACE HOTEL, ("CUR HOUSE") SEPTEMBER 3D, 1868.

The undersigned judicial committee, appointed by order of the Superior Court of this district, have conveyed themselves hither for the purpose of making, in conformity with her request, an official record of a will, intended to be made by Miss Isabella Ellington, residing at Columbus, Georgia, at present, sojourning in this city, in order to obtain sanitary relief at the springs.

The manager of the springs, Mr. Drevermann, of this place, personally known to the committee, introduced the

latter into Miss Ellington's room, making at the same time, the following explanations: Miss Ellington has been living at the Watering Place Hotel ("Cur House") for the last ten weeks; has registered her name as "Isabella Ellington, from the State of Georgia," and I have not the slightest reason to doubt her being the person she declares herself to be.

No other means of identifying this lady were available, Mr. Dreverman (manager of the springs) has approved, by his signature, this paragraph of the proceedings.

"ADMINISTRATOR DREVERMANN."

Miss Isabella Ellington was, to all appearances, an invalid, and confined to her bed. By a preliminary conversation with her, the committee have, however, become fully convinced, that in regard to her mental condition, she was perfectly able to make dispositions by will. She is also familiar with the German language.

Miss Ellington confirmed at the outset, the statement, that she had requested Mr. Drevermann to obtain the appointment of a judicial or official committee, and proceeded as follows:

"I reside at Columbus, Georgia, and came to this place, by way of Berlin, for my health. I am not married; it is my purpose to dispose, by will, of my property, in the following manner:

"§ 1. As my heiress, I hereby nominate my sister, Annie Ellington, residing at present at Berlin.

"§ 2. In case my above named sister should not survive me, I constitute as my heir, my uncle, S. C. Ellington, of Washington, Georgia.

"§ 3. I also hereby bequeath as follows: (*a*) My watch, my pearl necklace and my diamond cross, to Miss Annie Bell Redd, of Columbus. (*b*) My jewelry, called coral set, to Miss Halli Redd, of Columbus. (*c*) My ear-rings, breast-pin and necklace, a set which I call "Blue Jet," (or Bl. Lava) to Miss Louisa Maria Redd, of Columbus. The Misses, Annie Bell, Halli and Maria Louisa Redd, are the

children of my uncle, Mr. Redd, of Columbus. (*d*) A small cameo breast-pin, to Miss Johanna Gescherdt, of Berlin. (*e*) Two hundred dollars, to my servant, Maria Jane Thomas, of Columbus. (*f*) Three hundred dollars, to my friend, Miss Torry, of Columbus. (*g*) A heavy gold ring, to my friend, Johanna Grend, of Columbus. (*h*) My harp and my music, to Mr. George Schasse, of Columbus. (*i*) The two trunks, marked 'Belle Ellington,' to Mrs. S. C. Ellington, of Washton, Georgia. (*k*) The furniture remaining in my room at Columbus, to my aunt, Mrs. Redd, of Columbus. (*l*) My German books, to Mr. Towns, living temporarily at Berlin, but who resides in Columbus, Georgia. (*m*) One hundred dollars, to each one of the *two little sons* of my aunt, Mrs. Redd, of Columbus.

"§ 4. My heir is bound to transmit these legacies to the above named persons.

"§ 5. The diamond ring, found among my chattels, shall be returned by my heir, to the family of James Hunt; my heir is acquainted with the residence of the latter."

These minutes have been read in the hearing of Miss Ellington, approved and signed by her as follows:

"Action as *supra*. V. B. ELLINGTON."

SAUERLAND, *Sworn Secretary.*

SPANKEN,

Judge of the Superior Court."

And thereupon the propounder introduced and read in evidence to the jury the record and proceedings had in reference to the will of said V. B. Ellington, in that part of Germany called Prussia, the said record purporting to contain the said last will, with the probate of the same in the Courts of said Germany; an exact copy of which said record and proceedings is in the words, letters and figures as follows, to-wit:

THE FOLLOWING TESTAMENTARY PROCEEDINGS IN THEIR LITERAL CONTENTS.

To The Honorable Directors of the District Court of Law at Paderborn: Request for the deposition of a Last Will.

Miss Isabella Ellington, from Georgia, dwelling here presently for the restoration of her health, at the Sanitary establishment, purposes to enact her last will, and has commissioned me to invite a deposition from the Court of law for such a purpose; the which commission I hasten to fulfill, Miss Ellington being laid up in a very low state of health.

Lipp Springs, the 3d September, 1868.

The Director of the Watering Place,

(Signed) H. DREVERMANN.

D.

With the commission of an immediate deposition, or as it may be, reception of the last will from Miss Isabella Ellington, from Georgia, for the time being at Lipp Springs, and especially in her lodgings, have been charged:

1. The Counsellor of the District Court, Mr. Spanken; and 2, as Recorder of the Minutes, the Assistant to the office, Mr. Sauerland.

Paderborn, the 3d September, 1868.

(Signed) WEX,

Privy Counsellor of Justice,

Director of the District Court of Law.

PROCEEDINGS AT LIPPSPRING, IN THE SANITARY ESTABLISHMENT, THE 3D OF SEPTEMBER, 1868.

The last will having been verbally declared to-day, by Miss Isabella Ellington, from the State of Georgia, in America, before the undersigned, deputies from the District Court, in order to be recorded in the minutes of the proceeding, has, in her presence, been provided with a cover, twice

sealed with the official seal of the Law Court, and superscribed as follows: Herein is contained the testament of Miss Isabella Ellington, from Columbus, in the State of Georgia, which she has to-day, before the undersigned deputies, verbally declared, to be taken on record.

Lipp Springs, the 3d September, 1868.

(Signed) SAUERLAND,
Sworn Recorder of the Minutes.

(Signed) SPANKEN,
Counsellor of the District Court.

The Testament has been received in official keeping of the Court of Law.

Actum ut supra.

(Signed) SAUERLAND,
Sworn Recorder of the Minutes.

(Signed) SPANKEN, *Counsellor of Justice.*

PADERBORN, the 18th September, 1868.

Ad mandatum of the 9th of this month, the hereafter described testament.

Herein is contained the Testament of Miss Isabella Ellington, from Columbus, in the State of Georgia, which she has this day, before the undersigned deputies, verbally declared to be taken on record.

Lipp Springs.

(Signed) SAUERLAND,
Sworn Recorder of the Minutes.

(Signed) SPANKEN, *Counsellor of Justice.*

Was taken *ex asserato ad depositum re.*

A. T.

(Signed) CONSBRISCH. RECKEMEY. VAHRENKAMP.

PADERBORN, the 23d October, 1868.

Ad mandatum of the 15th of this month the testament hereafter described:

Herein is contained the Testament of Miss Isabella Ellington, from Columbus, in the State of Georgia, which she has this day, before the undersigned deputies, verbally declared to be taken on record.

Lipp Springs, the 3d September, 1868.

(Signed) SAUERLAND,
Sworn Recorder of Minutes.

(Signed) SPANKEN, *Counsellor of Justice.*

Has been delivered up for publication to the Counsellor of Justice, Spanken.

A. V. T.

(Signed) CONSBRUSCH. REIKEISEG. VAHRENKAMP.

PADERBORN, the 23d October, 1868.

This being the (day) legal term appointed for it, the last will of Isabella Ellington, dated 3d September, present year, having been delivered up from the deposit to the undersigned, Magistrate, was presented to the Attorney of the unknown heirs, the Counsellor of Justice, Mr. May. When the latter had recognized the seals as unimpaired, the testament was opened, published by reading it out, and provided with the mark of publication. The signature of the testament was presented to the Counsellor of Justice, Mr. May. The latter moved for a copy of the testament, and undertook to afford the necessary information to the parties concerned

Presentation. (Signed) MAY, and

A. V. S.

(Signed) SPANKEN,
Counsellor of the District Court.

PROCEEDINGS AT LIPP SPRINGS, IN THE SANITARY ESTABLISHMENT, ON THE 3D OF SEPTEMBER, 1868.

The undersigned, deputies from the Court of law, this day appointed by authority of the directors, had repaired hither,

the same day, for the purpose of enacting the last will of Miss Isabella Ellington, from the State of Georgia, in America, being on a visit here for the restoration of her health, and having to-day announced her intention of making a will. The Superintendent of the Sanitary establishment here, Mr. Drevermann, being personally acquainted with the deputies, conducted them to the room of Miss Ellington, and declared, withal: Miss Ellington is, for nearly ten weeks past, already lodging in the Sanitary establishment here. She had her name set down in the visitor's list, and I have not the least occasion to doubt as to the reality of her being the person she represents to be. Other means of ascertaining the identity of the lady were not at hand. After that, the superintendent, Devermann, has, in approbation of this of the minutes, which was read to him, given his signature to it:

(Signed) SUPERINTENDENT DEVERMANN.

Miss Isabella Ellington was apparently in a weak state of health and confined to her bed; but from the conversation entered upon with her, it resulted that, as far as her mental faculties were concerned, she was quite capable of testamentary dispositions. She is conversant with the German idiom. First of all, she corroborated the fact of having charged the Superintendent of the Sanitary establishment, Mr. Devermann, with the commission of providing the arrival of a deputation from the Court of law, and then she proceeded:

My home is at Columbus, in the State of Georgia, and I have come hither, by Berlin, for the restoration of my health. I am unmarried, and it is my intention now to dispose of my property, by last will. I am, therefore, devising as follows:

§ 1. I am hereby constituting my sister, Henny Ellington, who is presently living at Berlin, my heiress.

§ 2. In case of my sister, above mentioned, not surviving me, I am appointing, as my heir, my uncle, S. C. Ellington, at Washington, in the State of Georgia.

§ 3. I hereby bequeath: (*a*) My watch, my pearl necklace

my diamond cross to Annie Bell Redd, in Columbus. [y piece of jewelry, called coral set, to Halli Redd, in nbus. (*c*) My ear-rings, my breast-pin and necklace, a of jewelry, which I call "blue lava," to Mary Louisa , in Columbus. Annie Bell, Halli and Maria Louisa , are children to my uncle, M. Redd, at Columbus. . small breast-pin of cameo, to Johanna Gescherdt, at n. (*e*) Two hundred dollars, to my servant maid, Maria Thomas, at Columbus. (*f*) Three hundred dollars, to riend, Miss Torry, at Columbus. (*g*) A heavy golden to my friend, Miss Johanna Grend, at Columbus. (*h*) arp and my music, to Mr. George Chasse, at Columbus. he two trunks, marked with the name, "Belle Elling- to Mrs. S. C. Ellington, at Washington, in Georgia. he furniture to be found in the room of my dwelling , at Columbus, to my aunt, Mrs. Redd, at Columbus. y German books, to Mr. Towns, residing presently at n, but whose home is at Columbus, in Georgia. (*m*) hundred dollars to each of the little sons of my aunt, Redd, at Columbus.

. My heir is bound to deliver up these bequests to the ees.

. The diamond ring, to be found in the inheritance left e, has to be returned by my heir, to the family of Mr. s Hunt; my heir knows the dwelling place of that y.

ese minutes having then been read out, approved by Ellington, and signed by her as follows:

(Signed) V. B. ELLINGTON.

Actum ut supra.

(Signed) SAUERLAND,
Sworn Recorder of the Minutes.

ed) SPANKEN,
Counsellor of the District Court.

Published in the District Court of Law at Paderborn, the 23d October, 1868.

(Signed) SPANKEN,
Counsellor of the District Court.

[*L. S.*]

Are hereby authentically executed under seal and signature of the Law Court, Paderborn, the 16th of January, 1869, Royal Prussia District Court, Section II.

(Signed) WEX.

EXECUTION OF DEED.

I 625
E 53

The undersigned, Court of Appeal, is hereby certifying that in the enactment of the will foregoing here, the formalities prescribed by the laws in the Kingdom of Prussia have been observed in every point, and that, therefore, with regard to form, the will is to be considered as valid and binding in all its (devises) dispositions and clauses.

Paderborn, 26th February, 1869.

[*L. S.*]

Royal Prussia Court of Appeals.

I. 1407 e [illegible.]

II. 6151 Produced for the legalization of the signature preceding, Berlin, 22d March, 1869.

The Minister of Foreign Affairs,
In Commission.
The Privy Counsellor of the Legation.

(Signed) BULOW.

[Certified at the American Legation.]

The following proceedings legally drawn up, are verbally containing:

Translated at Paderborn, the 23d July, 1869.

The following witnesses appeared before the undersigned, deputies in Royal District Court here, at the Court day appointed on this date:

1. The Counsellor of the District Court, Mr. Spanken, sixty-five years old, Roman Catholic, appointed Counsellor at the District Court Royal here, and resident here.

2. Mr. Henry Sauerland, forty-four years old, Roman Catholic, appointed at the Royal District Court here as Office Assistant and sworn Recorder of the Minutes, and resident here.

After that, the Counsellor of Justice here, Mr. Lambert May, presented himself.

3. The wife of the Ranger, Louis Schlosser, Gertrude born Eckill, resident at Lipp Springs, near Paderborn, forty-nine years old, Roman Catholic.

After the persons named under 1, 2, and 3, had certified as to bearing no interest, either of relationship or otherwise, to the business concerned, first of all, the Counsellor of the District Court, Mr. William Spanken, declared: In my character of a sworn Magistrate in the District Court here, have I, with the aid of the sworn Recorder of the Minutes, Sauerland, and on the authority in writing from the Royal District Court at Paderborn, set to paper the proceedings dated Lipp Springs, 3d September, 1868, concerning the disposition by last will of Miss Isabella Ellington, from Georgia. I have executed these proceedings with the Recorder of the Minutes, by signing them, and thereby afforded already sworn evidence to the fact that Miss Ellington has made the dispositions by last will contained in these proceedings, has approved and signed them with her name. I now reiterate this evidence, and certify the correctness of it on my oath of office.

Read aloud, approved and signed.

(Signed) WILLIAM SPANKEN,
Counsellor of the District Court.

In the next place, the aforesaid Mr. Henry Sauerland declared:

In my character as sworn Recorder of the Minutes, have I, on the authority in writing from the Royal District Court here, written down here the proceedings dated Lipp Springs, 3d September, 1868, concerning the dispositions by last will of Miss Isabella Ellington, from Georgia, just as the Magistrate in deputation with me, the Counsellor of the District Court, Spanken, has indited them to me, in conformity with the declarations verbally imparted by Miss Ellington. I have, like that Magistrate, executed the aforesaid proceedings by signature of my name, and thereby afforded already sworn evidence to the fact that Miss Ellington has made the dispositions by last will contained in these proceedings, has approved and signed them with her name. I reiterate this evidence and certify its correctness by the oaths of my office.

Read aloud, approved and signed.

(Signed) HENRY SAUERLAND.

Last of all, Louis Schlosser's wife, Gertrude, born Eickel, declared: During several months the past year, have I, by day and by night, nursed Miss Ellington, from Georgia, who lodged in the room number thirty-seven, of the Sanitary establishment, at Lipp Springs, and thereupon died in the house of the bath-keeper, William Fisher, at Lipp Springs. Within that period, she frequently conversed with me about her death, and how she meant to devise about the property to be left by her. More especially she then mentioned that her uncle, S. C. Ellington, should be her heir, and should get her property. I have also been present at the enactment of her last will in the proceedings with the Counsellor of the District Court, Spanken, and the Recorder of the Minutes, Sauerland, have drawn up on the 3d September, 1868, and heard her repeat those declarations, "that her uncle, aforesaid, should be her heir and get her fortune," before the deputies from the Court of law; and that the proceeding set to

paper have been read out to her aloud, and, distinctly, I heard how, thereupon, she approved of these proceedings, and I saw how she signed them, herself, with her name. Upon all of this I may take an oath. Thereupon, the wife, Schlosser, after having previously been cautioned against incurring perjury, has sworn, as witness, to the evidence given by her, according to the formalities prescribed.

Read aloud, approved and signed.

(Signed) Louis Schlosser's wife, born
GERTRUDE EICKEL.

The Counsellor of Justice, Mr. May, moved for the issue of the original of Miss Ellington's will, and of to-day's proceedings, with the certificates. That the Counsellor of the District Court, Evers, in his capacity as magistrate and deputy of the Royal District Court here, has set to paper the proceedings of to-day, and that, by the Royal Prussian laws, full authenticity is to be attributed to such proceedings.

Read out, approved and signed.

(Signed) LAMBERT MAY.

A. U. S.

(Signed)
GUSTAVUS EVERS, *Counsellor of District Court.*
HERMANN HOCHLING,
Reperendary at the Royal Prussian Court of Appeals.

is hereby authentically executed, under the seal and the signature of the Court of appeals.

Paderborn, 30*th July*, 1869.

[*L. S.*]

The Royal Prussian District Court, Section II.

(Signed) WEX.

The foregoing signature of the Royal District Court here by the present, legalized with this certificate, that is, the [illegible] of the above proceedings, the formalities prescribed

in the laws of this Kingdom of Prussia, have been observed n every point, and that in every point full trust is attached to them.

Paderborn, 14*th August*, 1869.

[*L. S.*]

The Royal Prussian Court of Appeal.

[*Signature illegible.*]

Produced for legalization of the foregoing signature, Berlin, the 31st August, 1869. The Minister of Foreign Affairs. In Commission.

The Privy Counsellor of Legations.

[L. S.] (Signed) V. KEHLER.

I do hereby certify that I have made true extracts, and translated in the English language the annexed originals.

Berlin, October 20th, 1869.

[L. S. J. F. VON BERK.] J. F. VON BERK,

Lawful Translator of the Royal Court of Chamber.

I do hereby certify that the foregoing signature is correct.

By order

[L. S. Minister Seal.] *The Secret Legation Counsel.*

D. V. TULDET.

Certified at the American Legation, Berlin, November 6, 1869.

[L. S. American Legation.] ALEXANDER BLISS."

Whereupon propounder closed his case. Caveators introduced no evidence. Propounder contended before the Court and jury that the *writing* propounded, was a good *nuncupative* will under the testimony, and that under the proofs in the case, the testatrix, at the time of making said writing, was domiciled in Germany; that the same was a good will according to the laws of Germany, and that the same should be probated as a will, made in a foreign State, in this Court.

The Court decided that, as propounder had alleged by his petition, and had admitted by the agreement, in the testimony read to the jury, by agreement of counsel, that said testatrix was *domiciled* in said Muscogee county at the time of making said will, the propounder should not be allowed to contradict the same by showing that she was, at that time, domiciled in Germany.

The Court charged the jury: That, if the testatrix, in her life-time, made said writing and signed her name to the same, then the said writing was not a good *nuncupative will;* and if the jury so believe, they must find for the caveators.

That propounder, by his petition, alleged that testatrix was domiciled in said county of Muscogee, and by his other count, that she was domiciled in Germany; and further that, by the agreement of counsel in writing, which had been read in evidence, propounder had admitted that testatrix was domiciled in said Muscogee county, and that he could not contradict the same by showing that testatrix was domiciled in Germany. And that said writing, not having been signed by three witnesses, was not good as a written will, and that the jury must find for the caveators.

The jury returned a verdict for the caveators. Said S. C. Ellington says the Court erred in the several rulings, decisions and charges aforesaid.

Ingram & Crawford. R. Toombs, for plaintiff in error, obtained permission to review, Stamper vs. Hooks, 22 Ga. R., 603. They contended that the paper was a good nuncupative will by our laws: Code, secs. 2443, 2359; 1 Redf. on Wills, 189 *et seq.;* Dowal Pa., 296, pt. 2, ch. 3, tit. 1, sec. 3069. That it was written and signed by testatrix makes no difference: Code, sec. 2443; 1st Swinborn, 58 and 59; Mason vs. Durham, 1 Mont., 456; 3 B. Munroe, 162; 6th Mont., 123; 12th Sm. & M., 673; 9 Bar., 59; 1st Hag., 380; 1st Gratton, 129; 2d Sw. & Tri., 375; 1st Eccl., 404; 3d H. & J., 208; 2 Phil., 190; 10th Bacon's Abr.,

530; 1st Jarman on W., 136, note 3; 2d Book, Black's 418, note; 1st Munf., 456. As to domicil: See Story's Con. of L., 54, 55, 58; 1st Jarman on Wills, 10, 11; 2 Bos. & Pul., 229; Code, sec. 1689.

SMITH & ALEXANDER. BLANDFORD & THORNTON, for defendants, replied, writing destroyed this paper as a nuncupative will: 1st Swinb., sec. 12; 7 Bacon's Abr., 305; 2 Black. Com., 500, 501; 2 Swifts's System, 420; Irw's Code, secs. 2443, 2379; Stamper vs. Hooks, 22 Ga. R., 603. She did not ask witnesses to bear witness, etc.: Code, sec. 2443. Last illness means *in extremis*: 20th John., 502; 7 Bacon Abr., 305. The *lex loci domicilii* governs: Story's Conf. of L., secs. 467, 468, 474, 475; Stanley vs. Barnes, 3 Hagg. Ecl. R., 373 to 465; 4th Hagg., 346, 354; 1st Birnney, 336; 4 John. Ch. R., 460, 469; 1st Mason, 381; 3d Cranch, 319; 12 Wheat., 169; 9 Peters, 483, 504, 505; 2 P. Will. 291, 293; 14 Ves., 537, 541; 1 Fonbl. Eq. P., 444, 445, note; 7th Cr., 115; 4 John. Ch. R., 460; 20 John., 229; 10 Wheat., 192, 202.

WARNER, J.

A paper writing was propounded in the Court below, to be admitted to probate as a *nuncupative* will, upon the following agreed statement of facts, to-wit: "That the testatrix was a native of the State of Georgia, where she resided until she was of age; that in the year 1866, she went to Berlin, in Germany, for the purpose of completing her education, with the intention of returning to Georgia when her education should be completed, and remained in Berlin eighteen months; that, being in bad health, she went to Lipp Springs, in Germany, and on the 3d day of September, 1868, she was informed by her physician that she had the consumption, and could not live long; was then confined to her room and bed, and on the 3d day of October, 1868, she died, having never recovered from said sickness; that on the 3d day of Septem-

ber, 1868, she invited to her room one Spanken, and one Sauerland, and one Gertrude Schlosser, who was her female attendant and nurse, and who was present, in the same room, during the entire transaction, and then and there, in the hearing and presence of the said three witnesses, she expressed her purpose to make her will, and then and there she dictated the several items in said paper, purporting to be her will, and the same were then and there reduced to writing by the said Spanken and Sauerland, who signed the said paper as official witnesses, and the said testatrix then and there signed her name to the same. All of which testamentary dispositions appear upon the said paper writing; that the said paper writing speaks the truth, with the recitals therein, in reference to the facts therein recited; that said paper writing was executed, in substance and form, according to the laws of force in that part of Germany where the same was executed, and, by the laws of that country, would be a good testamentary disposition of real and personal property, located in that country; that said will has been proven and admitted to record, according to the laws of that country; that the property conveyed by said will, except the specific bequests in said paper mentioned, consists of lands and railroad stocks, located in the State of Georgia." On the trial of the case in the Could below, the Court charged the jury, "that if they believed, from the testimony in the case, the testatrix, in her life-time, made said paper writing and signed her name to the same, then the said paper writing was not a good *nuncupative* will, and if the jury so believe, they must find for the caveators;" to which charge the propounder of the will excepted. A *nuncupative* will, as defined by the law, is one which depends merely upon *oral evidence*, being declared by the testatrix *in extremis*, before at least three competent witnesses, and afterwards reduced to writing, within thirty days, under the provisions of our Code, after the speaking of the same. The paper propounded, if it had been attested and subscribed in the presence of the testatrix, by three witnesses,

would have been a good *written will*, under the law of this State. The fact that it was attested and subscribed by only two witnesses does not make it, in the sense of the law, a *nuncupative* will, although made during the last sickness of the testatrix, *thirty days before her death;* the more especially as it does not appear from the evidence in the record that, at the time the paper writing was signed by the testatrix, she was *in extremis*, or that the legal execution of the written paper was prevented by any sudden surprise or providential cause. If, after the will had been written, as dictated by the testatrix, and signed by her, and before the requisite number of witnesses could have subscribed the same, she had suddenly died, then the paper might have been propounded as a *nuncupative* will, notwithstanding she had signed the paper; for its legal execution would have been prevented by the act of God.

But, inasmuch as the facts stated in the record, and admitted to be true (and there being no conflicting evidence) do not, in my judgment, shew that the testatrix, at the time she signed the paper propounded, was in the sense of the law, *in extremis*, so as to authorize the same to be established as her *nuncupative* will under the law applicable to that class of wills, I am of the opinion that the judgment of the Court below should be affirmed, notwithstanding the Court charged the jury that if the testatrix in her lifetime made said writing and *signed her name* to the same, it was not a good nuncupative will; the verdict is right under the law applicable to the facts stated in the record; that is to say, the statement of facts admitted to be true, (there being no conflicting evidence) are not sufficient in law, to authorize the paper writing propounded to be established as the *nuncupative* will of the testatrix, although the charge of the Court on the point of *signing* the will may have been too restrictive, if the admitted facts would have authorized the jury to have found a different verdict, had the charge of the Court been otherwise upon that point in the case.

Let the judgment of the Court below be affirmed.

LOCHRANE, C. J., concurring.

The question in this case is, whether the will made by iss Ellington, in Prussia, can be set up as a nuncupative ll, under the laws of Georgia. The Court below held, hat the paper propounded having been written in the life ne of the testatrix, and signed by her, was not a good nunpative will." The will was declared verbally by Miss lington, while in a low condition of health, dying of conmption at Lipp Springs, Germany, in the presence of offiıls, who took down her declarations as they were made; d after they were thus written down, they were read over her, approved by her, and she signed them, and they were itnessed by the two officials. It is admitted that one other itness was present during this time, who is brought in as a itness in the proceedings in this case. It will be noticed at these verbal declarations were reduced to writing in her esence, and signed by her.

The propounder lays down three general propositions up- which he relies: 1st. That this will was the verbal deırations of Miss Ellington touching the disposition of her tate after her death, which they say was accompanied by l the circumstances required to set up a nuncupative will ıder our laws. 2d. That the reducing these verbal declations to writing did not alter their effect or character. 3d. hat her signing them after they had been reduced to writg did not change their effect or character.

To strip this case of all unnecessary theories, and take its ain meaning, we find that the testatrix did not intend any *rbal* or *nuncupative* will. She had time, opportunity and ans to make such a will as she intended; and she made it. e was not *in extremis*, or in haste, and lived thirty days er this will was executed by her. The only difficulty was at she made a will before two witnesses, under the law of ussia, instead of three, under the law of Georgia. If she d required the nurse to have signed at the time she signed

and the others signed, she would have had a valid written will. But she did not, and hence arises the difficulty of the case.

If we take this will, as made by Miss Ellington, with her signature thereto, how can we arrive at the conclusion that she made a nuncupative will? Here is a will made by the testatrix thirty days before her death, written as she dictated it, signed by herself and two witnesses. Laying, for the present, every other question one side, can we hold this to be an unwritten will, under the laws of this State? It bears no mark of such an instrument; neither in its inception nor in its consummation, does it present the familiar *indicia* of a nuncupative will.

And, after all the consideration we are able to give the question, we have not seen any law controlling us to reverse the judgment of this Court, in *Stamper vs. Hooks*, 22 Georgia Reports, 604. That decision was the opinion of the Court with Judge LUMPKIN, one of the greatest men that ever ornamented this Bench, with MCDONALD, a man of powerful and overtowering intellect, with BENNING, a man of large reputation and ripe experience in the profession. These men have declared, as the solemn judgment of the Court, that the signing of the paper which the party intends to be his will, prevents its being a nuncupative will.

In Bacon's Abridgement, nuncupative wills are defined, "by word or without writing." We find it laid down in Redfield, 188–9: "In many instances, it has been held that instructions for the drawing up of a written will, declared before the requisite number of witnesses, may be received and proved, etc., as a nuncupative will, where the testator is, by the act of God, rendered incapable of completing his will, in the mode contemplated by him. But this has been denied, in some cases; and, as it seems to us, with the greater show of reason and authority, since the very definition of a nuncupative will, *in all recent times*, is that it be made by the testator when he is *in extremis*, and so conscious of the

t that he apprehends he has not time to make a will in iting, etc."

But when the will is in writing, and signed and witnessed, annot be set up as an unwritten or nuncupative will. Our le, section 2443, provides for reducing *the words spoken* to ting. The will is not a written, but a nuncupative, testa- ntary disposition of property. It is urged that this was erbal declaration. So are mostly all wills not in the hand- ting of the testator. This fact cannot change the law. If lying on his bed, verbally dictates his will to B, who tes it down and then reads it over to A, and he signs it, he presence of three witnesses, this is a written will. If this transpires in the presence of, and is attested by two nesses, this failure of the proper attestation does not make uncupative, and this is this case.

Again, in this case, the testatrix used no words at the time t bear the intention of her making a nuncupative will. e record shows that she desired the appointment of a judi- or official committee, not as witnesses to her nuncupa-, but to execute her will, in consonance with the laws of ssia. The record nowhere treats it as nuncupative, but her last will. The language is her purpose to *enact*, ch, not only in its ordinary sense, but as demonstrated the proceedings, means *the whole solemn ceremonial of a rd*, more than writing. Such is the conclusion of this . After reading to her, she approved and signed, and proceedings say, "The last will having been verbally ared to-day by Miss Isabella Ellington, from the State Georgia, in America, before the undersigned Deputies n the District Court, *in order to be recorded* in the min- of the proceedings," etc.

hen, we say, from the record, that the will and its execu- both bear intrinsic evidence of the manner and intention he act, and negatives all presumption of nuncupation or aration intended to be left to witnesses, after her death, t up or establish. Again, we say that, under the weight

of authority, from the evidence, she was not *in extremis*; that is to say, she was not in such condition, from the agreed statement of facts, as is contemplated by law for the making of nuncupative wills.

Our Code does not define the last sickness, but leaves us to go back to the common law and ascertain the meaning attached to the words by the judicial exposition of Courts. From the time of Henry VIII., the law had become established in England that such wills, to be of any avail, must be made in the last extremity, when the testator did not expect to recover and had not time to make a more deliberate will, or a will in writing. The English statute, 2º Car., II., is like our own. The law of nuncupative wills, as to last sickness, etc., in this country, has received the same construction. In Priscilla E. Jarnall's will, 4 Rawle, it was held, the testator must be *in extremis* and have no time to make a written will; and one made by a consumptive patient, nine days before her death, was held not valid.

A nuncupative will is not good unless made when the testator is *in extremis*, or overtaken by a sudden and violent sickness, and has not time to make a written will, is the construction of "last sickness," under statutes of New York, 20 John's, 502. A nuncupative will is only good when made in such extremity of the last sickness as precludes a written one: Bayce vs. Frick, 4 Watts and Serg., 357. A nuncupative will, to be valid, must be made by a person *in extremis*, who has not power, ability or time to make a written one: 10 Gratt., Va., 548. The same doctrine is held in Haus vs. Palmer, 21 Prim., 296; see 4 Bradf. N. Y., 154, *ex re* Thompson; also in Lucas vs. Gaff, 33 Miss., 629. And the doctrine we educe from the authorities is to the effect, "that, where the testator did not intend to make a nuncupative will, and there was time to make a written one, it cannot be set-up as a nuncupative will, if such writing was signed by the testator, though not formally witnessed.

The class of cases like that in 1st Gratt., 129, are not ap-

plicable to the case at bar. In that case, where there was not time to complete the written will, it was set-up as nuncupative; but the act of completion must not have been dependent on mistake of the law, or other voluntary act of the testator. But in cases where extreme illness and the act of God prevents the fulfillment of the testator's design, such as swooning and other extreme necessity. If it is the result of choice, it cannot be so regarded in the light of the law.

It may be properly stated, as a general rule, that the questions arising, under the Code, as to *rogatio testium*, last sickness and circumstances, are matters of fact for the jury to find, under the law, as given them in charge by the Court. And we unhesitatingly affirm this rule, under our law, to be valid. But when the evidence agreed on could not change the verdict, legally—that is to say, when, under the facts and the law, the jury could not change the conclusion, we do not deem it necessary, on this account, to send the case back for adjudication.

And for these reasons, I concur in affirming the judgment of the Court below.

McCAY, J., dissented, but wrote out no opinion. His dissent, delivered from the bench, was as follows:

Where, at the request of a citizen and resident of Georgia, a young lady, who was temporarily in Prussia, a commission of its officials was appointed by a Court of that country to take the "immediate deposition, or as it may be, reception of her last will," one of which commission was designated as "the Counsellor" or "Judge" of said Court, and the other as "sworn Recorder of the minutes," and said commission convened at her lodgings, examined her landlord as to her identity and the time of her stay with him, were then admitted to her room, where they examined into the state of her health, her mental condition, her residence, her condition in life, and received from her a confirmation of her having requested their appointment, and thereupon, she dictated to

them, by word of mouth, her testamentary dispositions in detail, one other witness being present besides the said commission, and the whole of said proceedings were reduced to writing, headed, "Proceedings held at the Lipp Springs Watering Place Hotel, September 3, 1868," and were signed, officially, by said "Recorder," and by said "Counsellor" or "Judge" of said Court, and also by the testatrix, who was at the time confined to her bed, in a low condition, and had been informed by her physician that she did not have long to live, and who died, within a month of said sickness, and said minutes were transmitted to said Court as a record thereof of the *verbal dispositions* of the testatrix:

Held, first, That on a trial before a jury of an issue formed upon the propounding of said will, as a nuncupative will, it was error in the Court to charge the jury that, if the testatrix signed the writing proposed to be set up, it could not be set up as a nuncupative will.

2. That whether the said will was made in the last sickness of the deceased, and whether the other requisites of the statute regulating nuncupative wills had been complied with, were questions of fact for the jury, and the Court having, by its charge withdrawn these facts from the jury, a new trial ought to be granted.

W. M. MOSES, plaintiff in error, *vs.* JAMES T. FLEWELLEN, defendant in error.

It is only when the Judge below abuses his discretion, *i. e.* commits an error in law, that this Court will interfere with his granting or refusing an injunction. (R.)

Relief. Injunction. Before Judge JOHNSON. Muscogee County. Chambers. November, 1870.

Moses *vs.* Flewellen.

Flewellen's bill, filed in Muscogee, made this case: In May, 1867, Baldwin & Company obtained judgment against Flewellen for $18,233 93, and *fi. fa.* was issued in June, 1867. All of it has been paid but $5,000 00. Prior to June, 1865, one Bradley obtained a judgment against Flewellen, which now calls for $4,700 88. In March, 1869, Flewellen notified Bradley that he would apply to the next term of the Superior Court to reduce his said judgment, under the Relief Act of 1868, and filed a petition therefor, in the Clerk's office, which is pending, never having been heard. Certain property of Flewellen was levied on by Baldwin & Company's *fi. fa.*, and sold in March, 1869, for $7,000 00, to Baldwin & Company. Bradley's *fi. fa.* was placed in the sheriff's hands to receive said $7,000 00.

The Judge had announced that he would hear no motion to open judgments till further notice, and had not given such notice. For this reason, Flewellen took it for granted that the sheriff would not pay any money on the Bradley *fi. fa.* But Baldwin & Company's attorneys transferred that *fi. fa.* and Baldwin & Company's bid to Moses, of Washington county. Moses bought Bradley's *fi. fa.* for fifty cents on the dollar, and procured the sheriff to dispose of said bid of $7,000 00 by entering enough of it to pay the Bradley *fi. fa.*, as paid on it, and the balance as paid on the Baldwin & Company *fi. fa.* And now the Baldwin & Company *fi. fa.* is levied on Flewellen's other property to pay the balance due on it. "By set off and recoupment," Flewellen can defeat Bradley's *fi. fa.*, and he desires an opportunity to make the effort. (There is no averment as to what *facts* constitute his grounds for relief). Moses is insolvent, as Flewellen is advised and believes. Plaintiff's attorneys reside in Muscogee. He prayed injunction against the attorneys and Moses, and for a hearing upon the relief motion as to Bradley's *fi. fa.*, and a proper application of said $7,000 00.

By amendment, he averred that he had filed an affidavit of illegality to Baldwin & Company's *fi. fa.*, but because his

attorneys failed to get his notice to attend to the same, it was dismissed without a hearing. He does not aver what ground of illegality was taken.

Moses demurred to the bill, because he did not reside in Muscogee; because the decision of the illegality estopped Flewellen; because the bill contained no equity, and because the Relief Acts were unconstitutional, etc. The Court overruled the demurrer. Moses then answered, stating the *bona fides* of his purchase of said judgments and *fi. fas.*, insisting they were both unpaid, and that it was right to have said $7,000 00 so applied, and denying insolvency. The Court granted the injunction. That is assigned as error upon the grounds stated above, and because the answer swore off the equity, if any there was.

MOSES & DOWNING, for plaintiff in error.

INGRAM & CRAWFORD, for defendant.

LOCHRANE, C. J.

A *fi. fa.* obtained in 1867, in favor of D. H. Baldwin & Company, was levied on the land of Flewellen, and the property sold in March, 1869. Before the sale, Flewellen notified the sheriff that he would move to open a judgment held by Bradley, which was of older date, before June, 1868, which he had. Moses by transfer, became the purchaser of the property, and also of the two judgment *fi. fas;* and there being no motion made at the ensuing term of the Court to open the Bradley judgment, under the Relief Act of 1868, Moses demanded the money in the sheriff's hands to be applied first to it, which he did, crediting the balance on the younger, or Baldwin *fi. fa;* then it was levied for the balance upon Flewellen's plantation in Quitman county. This bill was filed, and injunction moved to stop the sale under the levy, and the main ground of equity relied on, grows out of the fact that the proceedings to scale the Bradley judgment were still

ending and undisposed of at the time this disposition of the money took place. It appears the papers were filed, but not docketed by the Clerk, and that the anouncement by the Judge at the term that he would not take up cases under the Relief Act, prevented Flewellen from making his motion at the time. His bill was that he has a good defense, etc., and presents the fact of notice to the parties, and insists upon the injustice of appropriating the $7,000 00, raised from the sale in the manner set out. Upon the hearing of bill and answer, the Judge granted the injunction requiring bond: Held, under the repeated rulings of this Court at the present term, the original jurisdiction over granting or refusing injunctions is vested by law in the Court below, and it is only in cases where there has been an abuse of the discretion—that is to say, an error in law is committed by the Judge below in granting or refusing an injunction—that this Court will interfere. And under the facts in this case we are satisfied the Court has not abused the discretion vested in him, by granting the injunction as prayed.

Judgment affirmed.

WILLIAM R. RESPASS, plaintiff in error, *vs.* JOHN C. ZORN *et al.*, defendants in error.

Where there was a bill pending in equity in favor of Zorn *vs.* Respass, in relation to the title and possession of land, and during Respass' temporary absence from the county, Zorn dismissed his bill and took out a proceeding as an intruder against Respass' tenant, an ignorant colored man, who had a growing crop on the premises, and who, from ignorance of his rights, failed to make the counter-affidavit required by law, and Zorn, was in consequence, put in possession, and Respass ousted, and Respass immediately on his return, made the affidavit, but the sheriff refused to receive or act upon it:

Held, That a bill setting up these facts, and praying a restitution of the possession as unfairly obtained under color of legal process, is not demurrable for want of equity, or because there is an adequate remedy at law.

Equity Practice. Landlord and Tenant, etc. Before Judge Green. Upson Superior Court. November 1870.

Respass' bill made this case. He bought certain land at sheriff's sale, in Febuary, 1870, paid his bid, and was put in possession. He did not know that any one claimed the land adversely to him. He rented it out to a negro, and gave him possession. In July, when this negro's crop was flourishing thereon, Zorn filed a bill against Respass setting up title to said land, and enjoining him from waste, etc, and charging that Respass was insolvent. Respass answered the bill, and the Chancellor, upon the hearing of a motion to dissolve the injunction, so modified it, as to allow the tenant to proceed to make and gather his crop.

In vacation, and without Respass' knowledge, Zorn had his bill dismissed, and, fraudulently taking advantage of Respass' absence from the county, procured a warrant against the negro as an intruder, and, by frightening him with eviction and refusing him time too see Respass, had himself placed in possession by the sheriff, and now by an insolvent agent has control over said tenant as his, and over the land and crop. Immediately upon Respass' return to the county, which was in a few days after said proceeding, he offered the sheriff a counter-affidavit and asked to have himself, as to his tenant, reinstated *in statu quo*, but the sheriff refused. He averred that the undisturbed possession of the crop by said tenant was necessary for justice, etc., and prayed injunction against Zorn and his agents interferring therewith, and for himself, as to his tenant, to be placed *statu quo*. He averred that the land was his, and prayed to correct a mistake in his, sheriff's deed, and that he was solvent.

This bill was demurred to, because Respass had an ample remedy at law; because there was no equity in the bill, etc. The Court dismissed the bill, and that is assigned as error

CABANISS & PEEPLES, for plaintiff in error.

S. HALL: JOHN I. HALL; SMITH & ALEXANDER, for efendant. Respass had not pleaded set-off, or set up any oss-claim, and Zorn could dismiss his bill: R. Code, secs. 99, 2856; 37th Ga. R., 364. Tenant should have filed unter-affidavit *at once:* R. Code, sec. 4000; 38th Ga. R., , Martin vs. Wall, June, 1870. Equity cannot put Res- in possession: R. Code, sec. 3157. As to correcting istakes: 7th Howard R., 829.

McCAY, J.

Assuming the facts stated in this bill to be true, (as we ust in deciding upon the demurrer,) one cannot escape the nclusion that the machinery of the law has been used to ive to the defendant an unfair advantage in the contest for is land. He had, by the filing of his bill, necessarily ad- itted the complainant not to be an intruder, since an intru- er is one who does not, in good faith, claim the possession. he Chancellor, by dissolving the injunction, had recognized he *bona fides* of the then defendant in his claim of the ossession, and we are not sure that, until that order, passed ith both the parties before him, was in some way dis- harged, it was not a contempt of the Chancellor to oust the ossessor by the summary process resorted to.

Section 4131 of the Code, whilst it allows the dismissal of bill in vacation, expressly provides that this shall not be one so as to prejudice any right of the defendant. The de- endant was, by the Judge's order, permitted to go on with he cultivation of the land and this, after a hearing of the everal claims of the parties. It smacks very strongly of ontempt of this order, passed in a proceeding, at the sugges- ion of the then complainant, to dismiss his suit, take out he intruder's warrant, and seize the opportunity of the tem- orary absence, from the county, of the landlord, to pounce pon the ignorant and careless tenant, and by *hocus pocus*, et the possession.

Even without the pendency of the bill, we should hesitate to let one retain a possession, acquired by imposing upon or colluding with a mere tenant. But, under the circumstances set forth, we think the pendency of the bill and the order of the Judge allowing the defendant to continue the possession, gives to the Chancellor jurisdiction to treat this whole proceeding, under the warrant, as an attempt to evade the effect of his order.

What the truth of the case may be we know not. We only say that, under the charges in the bill, it was a case for equitable interposition, under the power of the Court, to prevent the evasion of its own orders, and we think the demurrer ought to have been overruled.

GEORGIA A. WORTHY, plaintiff in error, *vs.* H. G. TATE, defendant in error.

Where a case was continued at the first term for providential cause, and before the succeeding term the plaintiff in error died, and there was no representative of his estate, and when the case was called upon the docket, the death of such plaintiff was suggested, and motion was made to dismiss the case upon the ground that the constitutional provision requiring the Supreme Court to dispose of every case at the first or second term after writ of error brought, was imperative, and that the Rule of Court, where its application extended the hearing over or beyond the second term, was in violation of the Constitution:

Held, That the mandate of the Constitution relative to the disposition of cases, did not apply to such as fell within the rule of providential cause; that by the Act of organization of this Court, and the Seventeenth Rule adopted under the old Constitution containing a like imperative provision, requiring the Court to "dispose of and finally determine each and every case on the docket of such Court at the first term" after writ of error brought, the provision relating to the making of parties in case of death, was the legal and proper construction of the Constitution in this regard, as provided for in the adoption of this Rule.

Held, again, That the Constitution does not imperatively require the disposition of cases where the parties have died without affording the

ıns of compliance with the Rules of this Court, and parties repre-
tative can be instituted to prosecute or defend the legal rights of
deceased.

again, That at the first term succeeding the death of a party, it is
necessary to show diligence, in this that the death was so recent
t parties could not have been procured to administer or qualify to
ıg the case within the rule of continuances, even under our holding
t a temporary administrator may be made a party to carry on the
. But the death of the party is, in itself, such providential cause as
l authorize a continuance at the term next succeeding the decease,
ere there is no representative of the estate of such deceased party,
hout proof of diligence at that term, and at that term only.

otion to dismiss Writ of Error from Troup county.

ıis writ of error was returned to June Term, 1870. It
then continued because of the sickness of Mrs. Worthy's
sel. When it was called at January Term, 1871, her
sel stated that she had died since the last term, and had
dministrator, and proposed to let it stand for the next
to make parties. Defendant's counsel moved to dis-
the writ of error for want of prosecution.

. J. HAMMOND & BROTHER; LONGLEY & HARRIS, for
on, cited: Constitution 1868, Art. V.; R. Code, section
); 41st Ga. R., 32. Temporary administrator could have
made party: R. Code, secs. 2451, 2449; 39th Ga. R.,

. H. BIGHAM, *contra.*

OCHRANE, C. J.

he question in this case comes before the Court on a mo-
to dismiss it, under the constitutional provision, requir-
"the Supreme Court to dispose of every case at the first
econd term after such writ of error is brought:" Code,
5170, Art. V., Judicial Department. It is contended
this constitutional provision is imperative, and, when in-
d, admits of no discretionary enlargement, by construc-
or by rules of the Court, that, in fact, the rules of this

Court which authorizes parties to be made in cases of death, where the application of the rule extends the hearing over the second term, is itself a violation of the Constitution. We recognize, in its fullest extent, the principle and public policy requiring the prompt administration of the law and disposition of cases brought to this Court, and have considered this question in the full light of the constitutional provision adverted to.

The Constitution of this State, under which this Court was organized, contained a more limited time than that prescribed in our present Constitution. In the former, the language was: "And the said Court shall, at each session, in each district, dispose of and finally determine each and every case on the docket of such Court, at the first term after such writ of error is brought." Under the Act of 1845, providing for the organization of this Court, under this constitutional provision, we find, by the 5th section, the legislative construction of what the Constitution means by declaring every case on the docket shall be finally determined at the first term after writ of error brought, and that legislative construction is in the following words: "The Supreme Court shall proceed, at the first term, *unless prevented by providential cause*, to hear and determine," etc., etc.

The mandate of the Constitution that such Court should finally determine every cause at the first term, was, by the Legislature, construed to except such cases as fell within the rule of providential cause. The old Constitution and the new, both, make provision, for cases where the plaintiff in error was not prepared at the first term to prosecute the case, that the case should be stricken and the judgment below be affirmed, unless prevented by providential causes. But the 5th section of the Act of organization of this Court clearly applies to the defendant in error as well as the plaintiff, the intendment of this reasonable rule of providential necessity. And the three Judges who first were called to preside over this Court, two of them now gathered home from the full-

brightness of their judicial fame and the other still
, an ornament to the profession and the bench, when,
organization of this Court, they met to adopt rules
government, gave the same construction; and by Rule
teen, similar to the one we have under consideration,
provided, whenever, pending a cause in this Court,
party shall die, how parties were to be made before
se could be heard or finally disposed of.

l the judicial interpretation of the Constitution and
f the Legislature referred to were passed on in 2*d Geor-*
11. Judge WARNER says: "There is no one feature
indelibly stamped on the face of the Constitution and
ct of the Legislature organizing this Court, than that
prohibits all delay in the trial of causes which are
ht before it. Delay in the decision of causes in the
me Court was one of the prominent evils urged against
ganization, and we have endeavored faithfully to carry
ie will of the Legislature in this particular by closing
e avenues which might lead to such a result." The
on goes on to press the justice of the constitutional pro-
s and the Act of organization, concluding, "all delay
prompt administration of justice was intended to be
ed, except for *providential* causes."

e principle of exception for *providential* cause has been
and again maintained in the practice of the Court, and
een inhibited by no provision of law. The rule stands
is subject as it was originally framed, and the new Con-
ion is more liberal than the old one upon this subject.
this case, we find that, at the first term after the case
rought to this Court, it was continued for providential
. This is the second term, and when called, counsel
sted the death of the plaintiff in error. Under the
s of the Court, defendant moved to dismiss the case,
r the Constitution requiring every case to be disposed
the first or second term. We are of opinion that the
of cases to which the Constitution applies are such as

are not within the exception of providential cause. It would be too rigid a construction of our Constitution and laws to apply its provisions to the *dead*, and dismiss cases that have no representatives before the Court. Such is not the interpretation we place upon the requirements of the Constitution.

Providential cause exempts the case from the operation of ordinary rules, and reason demands, in cases of death, the necessary pause until parties representative can be instituted to prosecute or defend the legal rights of the deceased.

After reviewing the original rule adopted in the organization of the Court, we are satisfied it was based on a sound and solid basis of constitutional justice. Under it the practice has been long and uniformly acquiesced in, and in affirming it, we feel firmly assured and satisfied of its legal and constitutional provisions.

Applying it to the case at bar. The plaintiff in error died since the last term of this Court. And was there sufficient diligence shown, is case diligence is, by the rule, demanded, to entitle the party to a continuance?

At the first term providential cause intervened, and the Court continued the cause; neither party was charged or chargeable with this continuance. The case was pending in this Court and one of the parties has died, and there is no representation of his estate at this term. This being the first term succeeding the decease of the party, was it necessary at this term to show diligence in this, that the death was so recent? Letters of administration could not have been procured to bring the case within the rule of providential cause. We are indisposed to impose this requirement at the first term succeeding the death of a party.

Since the decision of this Court, recognizing a temporary administrator to be made a party to litigation, much force of argument can be used to carry this requirement of diligence and compel parties to a prompter conformance, in matters of qualification by representatives of estates. But danger to the

interests of estates might result in such haste to procure the proper parties, and death brings to households and families such distress and derangement of affairs, that the spirit of our law stays suits and business for the time necessary to arrange the affairs of the deceased; and the rule which we affirm gives to the opposite party, in this case, the right to move, so as to preclude delay over the appointed time. And we lay it down, that the death of the party is, in itself, providential cause to continue a case, at the term next succeeding the decease, where there is no representative of the estate of such deceased party, without proof of diligence at that term, and at that term only.

Motion to dismiss overruled.

A. B. HOWARD, plaintiff in error, *vs.* E. H. WORRILL *et al.*, defendants in error.

Where, in a controversy before the Court of Ordinary as to who should be appointed administrator, the Court appointed H., who was an heir-at-law, and he failed to give security, after time granted him for that purpose, after which, as between W. and F., both claiming on the ground of being principal creditors, the Ordinary appointed F., and W. appealed to the Superior Court, and, at the Court, H. claimed the right to the administration, and the Court held that he was estopped by the proceedings before the Ordinary appointing him, and his failure to give the security:

Held, first, That the appeal from the Court of Ordinary brings up the whole record, and all the parties cited to appear in the Court of Ordinary are parties to such appeal; but the issue before the jury is on the judgment of the Court, and such parties may unite with the appellant upon the trial of such issue, or may submit their own claims with his, as having precedence and right, in law, to such administration, and are not confined on the appeal to assert the rights of either contestants, but on the appeal, which is in the nature of a *de novo* investigation, may submit their superior claim or claims.

Held, again, Under the facts of this case, H. had no right to participate in striking the jury; the appellant and the party contestant appointed by the Ordinary were the parties before the Court, whose rights in se

lecting a jury were incident to such appointment and appeal; and inasmuch as there were no other parties before the Court, and H. had already been heard in the Court of Ordinary, and failed, from inability, to avail himself of the judgment in his favor, and such judgment was, by a Court of competent jurisdiction, and not appealed from by others, it was not error in the Court to refuse to submit his claims for administration; for that question had been decided, and he was estopped by the decision and his failure to conform to it.

Appeals. Administration. Before Judge BIGBY. Meriwether Superior Court. August Term, 1871.

(WARNER, J. being interested, did not preside in this cause. It is sufficiently reported in the opinion.)

B. H. BIGHAM, for plaintiff in error. Appeal brings up whole case: R. Code, sec. 3571. Superior Court sits as Ordinary: R. Code, secs. 2458, 361. Less strictness here than at common law: 17th Ga. R., 417; 18th, 471. Amendments: 4th Ga. R., 456; 13th, 174; 25th, 467; 26th, 398. Appeal by one party: 1st Kelly, 475. Howard's rights are not adjusted: 8th Ga. R., 335; 18th, 618.

E. H. WORRILL, by B. HILL; PARK & FREEMAN, for defendants.

LOCHRANE, C. J.

In this case, it appears, from the record, that a controversy arose, before the Court of Ordinary, between the parties hereto, as to who should be appointed administrator, *de bonis non*, on the estate of Catlett Campbell, deceased. Howard claimed as heir-at-law or distributee, and the others as principal creditors. The Ordinary appointed Howard, and he failed to give the security after time granted him for that purpose. The Court then appointed Freeman administrator, and Worrill, being dissatisfied, appealed, and the case came before the Superior Court upon the appeal. When the case was called in the Superior Court, the parties announced ready,

nd Howard claimed the right to be heard as a party moving or the administration, as one of the heirs-at-law, etc. The udge held, in effect, that he had no right to appear and laim the administration; that he was estopped by the action f the Court of Ordinary and his acquiescence in the judgent of the Ordinary, and in the contest between Worrill nd Freeman, would not be heard on his claim for the adinistration. As the case of Worrill vs. Freeman is also efore this Court, I shall confine myself to the issue strictly efore us. (See next case.)

It is not disputed that Howard was an applicant for administration, etc., before the Ordinary, and was appointed nd failed to give security; that, on his failure, there were wo contestants for the administration, both claiming the ight of being principal creditors; that one succeeding, the dgment appointing *him*, was carried, by appeal, to the Suerior Court by the other. What case was carried to the Superior Court by this appeal? As a primary proposition, we may say, (section 3571, Revised Code,) "An appeal to the Superior Court is a *de novo* investigation, and brings up the whole record from the Court below." And all parties ited to appear in the Court of Ordinary are, by operation of law, parties to such appeal. 25th Georgia, 467, gives, however, the widest latitude to parties. How and in what manner do they stand before the Court on such appeal? Is very distributee, heir and creditor parties to separate, disinct and individual issues? I think not; there is but one se before the Court, and that appears from the record of ppeal. The issue the Superior Court is to try is the appeal om the judgment of the Ordinary. This goes to the jury, nd the various parties carried up by the appeal may unite ith the appellant, or may submit their own claims with his s having precedence to the letters of administration, and ey are not confined, on the appeal, to assert the rights of ther contestants, but may, as against the appointment of the rdinary, submit their own superior claim or claims. This

we conceive to be the rule on such appeals. The citation for letters before the Ordinary makes all parties in interest parties to the proceedings, where the Ordinary appoints one and the case is appealed. Upon that appeal, all parties are carried up with the record before the Superior Court, and may submit, in the one issue to be tried by the jury, their claims; but the two parties contestant, who have a right to strike the jury, are the parties appealing, and the party appointed administrator, (except more appealed;) and the appellant is the party the Court must recognize as having the right to control his side of the case. And, under the facts, we do not think Howard had any right to interfere in striking the jury, nor had he any right, before the Court, which he asserted on the trial. His claim was to be appointed administrator. In our opinion, his appointment by the Ordinary and failure to give the bond was complete and binding on him, and, afterwards, he had no right to become an applicant for the letters before the Superior Court.

This would be allowing him to submit a question decided by a Court of competent jurisdiction in his favor, from which there had been no appeal by others, and of which he could not avail himself on account of his inability to give the required security. In such case, we cannot hold that the appeal by Worrill from the judgment of the Court of Ordinary appointing Freeman, was such an opening of the case *de novo* as embraced the rights of Howard to the administration to be submitted to the jury. The record that went up did not carry with it a question adjudicated by the Court of Ordinary, so far as Howard was concerned; and as no other party was before the Court claiming rights, and his had been adjudicated by the Ordinary, without any appeal, we think the Court below was right in refusing to him the right to submit his claim to the jury, on the facts in this case.

Judgment affirmed.

Freeman *vs.* Worrill.

A. H. FREEMAN, plaintiff in error, *vs.* E. H. WORRILL, defendant in error.

Where there was a contest between two creditors, for the administration of the estate of their debtor, and it appeared that W. was a creditor for $2,000 00, and F. a creditor for $150 00, that both were creditors by promissory note, and that the estate was insolvent:

Held, That it was error in the Court to exclude from the jury, evidence that a large portion of the other creditors, some of whom were judgment and mortgage creditors, preferred the appointment of F. Whilst such preference was not imperative, it was still matter proper for the consideration of the jury.

Administration on Estates. Before Judge BIGBY. Meriwether Superior Court. August Term, 1870.

Campbell died insolvent. Worrill and Freeman each applied, as creditor, for administration, and the Ordinary granted it to Freeman. The cause was on the appeal in the Superior Court. Worrill testified, that when he applied for letters of administration in the Court of Ordinary he thought he would realize something on his $2,000 00 note on the estate, but now saw that mortgages and judgments would absorb the estate, but he claimed the administration as largest creditor, and put in evidence said note.

Freeman testified, that the estate owed him nothing but a promissory note for $150 00, but presented as evidence a request from various creditors, whose debts amounted to $40,000 00, asking him to administer, and, upon that, claimed the right over Worrill. The Court rejected this evidence, and instructed the jury that the creditor having the largest debt was entitled to the administration, and they found in favor of Worrill. This action of the Court is assigned as error.

GEORGE L. PEAVY, for plaintiff in error.

E. H. WORRILL, by B. HILL, for defendant.

McCAY, J.

Section 2458, paragraph 5. of the Code, is in these words, on the subject of the appointment of creditors as administrator: "When no application is made by the next of kin, a creditor may be appointed; and among creditors, as a *general rule*, the one having the greatest interest will be preferred." The next paragraph is in these words: "The persons entitled to an estate may select a disinterested person as administrator, and if otherwise competent, he shall be appointed."

This is an insolvent estate. The next of kin are out of the way, and the contest is between creditors.

Clearly, it is not simply the *largest* creditor that is entitled. The words of the Code are, the one having the *greatest interest* will, as a *general rule*, be preferred. Under this rule, a creditor of superior dignity, whose claim would sweep the estate, would surely have preference of one whose debt would get nothing, though it were much the largest in amount. In this case, it would appear, from the evidence, that neither of the contestants stand much chance of getting anything, since the judgments and mortgages will, probably, absorb the assets, and they both are only holders of promissory notes.

The very language of the Code implies that, in the case of creditors, the rule of preference is not imperative. The words are, "as a *general rule*." This implies that other circumstances may be considered. Under our system, the jury is, under the rules of law, to decide. Ought they not to have the facts? The wishes of the majority of those at interest is, as it seems to us, a material fact; the residence of the parties is another. We think the Court erred in excluding these facts from the jury. Especially do we think this, as to the wishes of the mortgage and judgment creditors who have the *largest* interest in the estate.

Judgment reversed.

ROE, *casual ejector*, and H. MERRILL, tenant, plaintiffs in error, *vs.* DOE, *ex dem.*, P. H. WHITAKER *et al.*, defendants in error.

1. Continuances are in the sound discretion of the Court, and this Court will not disturb the judgment of the Court below, on a question of continuance, unless there be an abuse of the discretion vested, by law, in the Judge.
2. The value of the premises in dispute, in an action of ejectment, except so far as it affects the *mesne* profits, is immaterial to the issue.

Ejectment. Continuances. Before Judge BIGBY. Coweta Superior Court. September Term, 1870.

This was ejectment, by Doe, upon the demises of Whitaker *et al.*, against Roe, casual ejector, and Harrison Merrill, tenant in possession. The evictions were charged to have been in 1863 and 1864, and suit was begun in 1869. When the cause was called for trial, Merrill was absent. His counsel moved for a continuance, stating that they could not go safely to trial without Merrill's presence, for he had all the papers upon which they rested the defense; that Merrill bought the land from the real plaintiff in 1863, gave his note therefor, and took a bond for titles; that the plaintiff sued Merrill on this note, but dismissed that action and brought ejectment or the land, although Merrill offered to pay the value of the note since the war; that Merrill, and the bar generally, understood that no causes, founded upon contracts entered into prior to June, 1865, would be tried at this term, unless the defendant was willing, and relying on this understanding, counsel did not get ready to try this cause. The Judge said he had given notice to all the bar, ten days before Court, that the rule as to passing old causes would not cover ejectment causes, and refused a continuance.

Title in plaintiff was shown. The evidence as to value for rent, *per annum*, varied from $100 00 to $120 00. It was shown that defendant had put about $90 00 worth of improvements on the place. Defendant offered to prove the contents of said bond, without showing its loss, etc., and the

value of the premises at the date of his alleged promises, and the value at the trial, but did not offer to show that the value was increased by his improvements. The Court rejected the evidence.

The verdict was for the plaintiff, for the premises and $375 00 *mesne* profits. Defendant moved for a new trial, upon the ground that the Court erred in refusing said continuance, and in rejecting said evidence, etc. A new trial was refused, and that is assigned as error.

J. B. L. DAVIS; SMITH & TURNER, for plaintiff in error.

S. FREEMAN; H. BUCHANON, for defendant. As to continuances: R. Code, secs. 3473, 3480; 39th Ga. R., 591, 678. Contents of bond: R. Code, secs. 3708, 3709, 3714; Gr. Ev., secs. 82, 84, 85, 86, 87; 6th Ga. R., 188; 9th, 471. Value of premises: R. Code, sec. 3703; 6th Ga. R., 88, etc.

McCAY, J.

1. This Court has uniformly held, that continuances are in the sound discretion of the Court, and will not be interfered with, unless the error be clear, and damage has accrued by the refusal. We can hardly see how these parties could have mistaken the announcement of the Judge, as ejectment cases can only come under the class of old debt cases under extraordinary circumstances.

2. Nor can we see what the value of the premises had to do with the matter. The evidence offered was not, as was admitted, tendered to throw light on the question of *mesne* profits, and for any other purpose it was wholly immaterial. What can it matter as to the right to recover, whether the land be worth $100 00 or $1,000 00? So far as the record discloses the case, we can see no imaginable, proper use that could have been made of the evidence of the value of the premises in dispute, and we think the evidence was properly rejected.

Judgment affirmed.

Calhoun *vs.* McLendon.

JOSEPH CALHOUN, plaintiff in error, *vs.* H. N. MCLENDON, defendant in error.

Where a party applies, under the Act of 1868, for homestead, and the facts show that he is a bachelor, having no person depending on him for support and maintenance, which the law imposes on him as a legal duty, and the Court below affirms the judgment of the Ordinary, holding that such single person was not the head of a family, and not entitled to a homestead:

Held, That there was no error in the judgment, but that it was in consonance with the judicial interpretation of the Constitution by this Court in the premises:

Held, That the Act of 1870, declaring a single person to be the head of a family, is not a judicial construction of the Constitution; that the judiciary, under our government, is alone empowered to interpret the Constitution and laws, and, with great deference to the Legislative Department of the State Government, we hold that it is not competent to enact that a single person living to himself or herself is the head of a family within the meaning of Article VIII., section 1, of the Constitution, but the decision of this Court on that subject is paramount.

Homestead. Constitutional Law. Before Judge BIGBY. Coweta Superior Court. September Term, 1870.

Calhoun, a bachelor, with no family but hired servants, applied for a homestead, as the head of a family. McLendon, a creditor, objected, and the Court ruled that Calhoun was not the head of a family. That is assigned as error.

SMITH & TURNER, for plaintiff in error. Servants constitute family: 1 Bouv. Dic., Family; Webster's Dictionary, Family; Am. L. Times, 267; Act of 1868, sec. 7; Act of 1870.

WRIGHT & DOUGLASS, by J. B. S. DAVIS, for defendant.

LOCHRANE, C. J.

1. The simple question raised by this record is whether a bachelor, without any persons dependent upon him, is entitled to a homestead, under the Constitution and laws of this

State, *is the head of a family.* The applicant petitioned the Ordinary, under the Act of 1868, setting out that he was the head of a family, consisting of servants, etc. The defendant in error objected to the application, and the Ordinary sustained the objection. He then appealed to the Superior Court, and the testimony was submitted, by consent, to Judge Bigby, who presided. The proof showed that Calhoun had never been married; that he had certain servants, which he claimed constituted him the head of a family. The Judge held he was not the head of a family, and this is the error assigned.

This Court has held that a single man, under the Constitution, having no persons dependent on him for a support or maintenance, in the meaning of the Constitution, was not the head of a family, and the servants proven to be in the employ of Calhoun, in this case, does not change the rule. If this case can be maintained, it must be by applying to it the provisions of the Act of 1870, section 7, whereby it is declared: "That any single person, male or female, or married person in a state of separation, who, at the time of the adoption of the present State Constitution, or before, lived habitually as housekeeper to himself or herself, on his or her own land, is hereby declared to be the head of a family." The argument in this case invokes our decision upon this question, as it would be unnecessary to dismiss this application and present another, if the law applies, and we can remand it with instructions governing it.

2. A difficulty, however, arises in the construction of the Act of 1870, not seemingly contemplated by the counsel who invokes it application. This Court, in 40 *Georgia Reports*, 173, gave judicial interpretation to the constitutional provisions regarding homestead, and decided what constitutes a *head of a family*, under the same.

The Constitution declares: "Each head of a family or guardian or trustee of a family of minor children shall be entitled to a homestead," etc. "And it shall be the duty of

the General Assembly, as early as practicable, to provide by law for the setting apart and valuation of said property, and to enact laws for the full aud complete protection and security of the same to the sole use and benefit of said families as aforesaid."

The Constitution in using the terms "each head of a family," left the question of what constituted the head of a family open for interpretation; and the Courts alone had the right to interpret the question, or to say who was, within the meaning of the Constitution, the head of a family. And after such interpretation can this Court hold that the Legislature was clothed with the power to change the law as laid down by the Court? This Court has laid down the law to be that a single person, without dependents of kindred whose maintenance the law imposes on him, is not the head of a family in the contemplation of the Constitution. And, while we have great respect for the law-making power, we cannot defer to its construction of the Constitution or laws. That power is lodged in the judiciary, and we need not multiply authorities to demonstrate a principle so clear that its assertion would be weakened by the implied necessity of an argument. The only question is, did the Act of 1870 come within the powers conferred upon the Legislature by the Constitution in regard to homestead.

The duty is devolved on the General Assembly to provide by law for setting apart and valuation of the property, and to enact laws for security thereto. Does this expression of duty imply the right to legislate who should be the head of a family? It is true, it is not directly in conflict with the Constitution, but it is equally true that it is in conflict with the decision of this Court. Now, in matters of conflict upon construction, we have just said the Courts are paramount. In a case decided last week, *Walker vs. Walker*, I stated in delivering the judgment of the Court, that the act we were invoked to exercise was a legislative act, and not a judicial one. It was not one of construction but of legislation. In

the dividing line of power between these co-ordinate branches we find here the boundary—construction belongs to Courts, legislation to the Legislature. We cannot add a line to the law, nor can the Legislature enlarge or diminish a law by construction. There are cases where the legislative intent guides the Court in the construction or exposition of what the law is, and Courts look to the intent of the Legislature as an element in their construction. But when the Constitution is the subject-matter of construction, the Courts are the authority. And we have no hesitation in saying the Legislature cannot, by the declaration of an Act, make a single person living to him or herself the head of a family, whatever may be their power to exempt property from levy belonging to such persons. And we therefore in this case affirm the judgment of the Court below.

A. C. WARE, guardian, plaintiff in error, *vs.* DANIEL WARE *et al.*, defendants in error.

Where a bill in equity was brought by a ward, through her guardian, against an administrator, charging that, by a previous litigation against such administrator, she had obtained a decree, by which she was decreed a specific interest in certain property, being an undivided interest therein to the value of $2,850 00, and the jury further decreed, that "this decree shall operate as a conveyance to her of said undivided interest in said lands and premises," and the bill avers that the property is being wasted and mismanaged, and that the sale of the whole is necessary to a proper division or partition, and that the administrator and his securities on his bond are involved, and that the administrator refuses to comply with the decree in the premises and sets up new defenses; that the property belongs, in part, to other heirs, and that they were not parties to the original bill, and not bound thereby; and the bill prays for the appointment of a Receiver and a sale of the property, for the purpose of division, and the Court, upon the hearing, dismissed the bill for want of equity, on the ground, the questions raised were previously adjudicated:

Held, That the Court erred; that the facts alleged constituted strong

grounds for the interposition of equity, and that it was the duty of the Court to have retained the bill and appointed a Receiver, and by proper process to have caused all the parties in interest to be made parties to the bill, and to have adjudicated and settled the respective rights of the claimants, if found that they were not bound by the decree in the original bill, and to have the property sold for the purposes of division. And we remand this case to the Chancellor, with these instructions.

Partition. Equity. *Res Adjudicata.* Before Judge Bigby. Troup Superior Court. September, 1870.

This was a bill to prevent waste, appoint a Receiver, etc. It is sufficiently reported in the opinion. While complainant was presenting the bill, defendants' counsel moved to dismiss it. Plaintiff's counsel said the motion was out of order. But the Court allowed defendants' counsel to proceed. His motion to dismiss was upon the grounds, that the matter was *res adjudicata*, as appeared by the exhibit to the bill, because there was no equity in this bill, and because complainant's remedy was complete at law. The Court dismissed the bill. Error is assigned upon hearing the motion while complainant's counsel was presenting his cause, and upon the dismissal of the bill.

Bigham & Whitaker, for plaintiff in error.

Mabry, Toole & Son, for defendants.

Lochrane, C. J.

This case presents for review the order of the Judge below, granted at Chambers, October 18th, 1870, dismissing the bill of complainant.

The bill was brought by Mary S. Poythress, by her guardian, A. C. Ware, charging that Daniel Ware became the administrator of Sarah Jane Poythress in 1864, that in 1866, she had filed her complaint in equity to Troup Superior Court, (which is attached as an exhibit,) against him, and had obtained thereon a verdict at the November Term, 1866, which

we will recite as a statement of the case, and for the reason that the whole controversy now before us turns upon that verdict and decree. It is as follows: "We the jury find and decree that Daniel Ware, as administrator of the estate of Sarah Jane Poythress, deceased, for whom he was trustee when she was in life, has in hand, belonging to said Mary S. Poythress, arising from said trust estate, $2,850 00, which we accordingly decree against said Daniel Ware, as administrator of said Sarah Jane Poythress. We also find that the same was invested by the said Daniel Ware in the residence place, and eighty acres of land adjoining the town of LaGrange, and north of the grave-yard in said place, whereon the said Daniel Ware and his family now reside, and that the said land and premises are subject to the discharge of the aforesaid sum to the complainant. We, therefore, decree to the complainant a specific interest in said property to be an undivided interest therein to the value of $2,850 00, to be paid her, or to said A. C. Ware, her guardian, or to his successors, or her heirs or assigns, out of any sale, disposition or division of said place that may hereafter take place, without abatement as to amount, and to bear interest from the date of this decree, *and this decree shall operate as a conveyance to her of said undivided interest in said land and premises*, as above expressed and described. We further find and decree that a compliance with this decree shall operate as a full acquittance, and discharge of all further liability of said Daniel Ware, and his securities on his bond as administrator of said Sarah Jane Poythress."

The bill charges, that she has applied to defendant for a sale, which was refused, and that he is in collusion with others and committing waste, and that the administrator and his security are wholly insolvent. The bill prays for the appointment of a Receiver, and for a sale of the property.

The defendant pleaded to this bill of complaint, the former bill of complaint, alleging that there is neither new matter or parties, and that the question is *res adjudicata*.

We need not go into the volume of papers connected with this case, farther than to say, the whole questions made upon the present bill are no where sufficiently met by any legal or equitable defense that would authorize this Court to hold the parties estopped in prosecuting their rights to a partition of the property by sales. The decree gives a specific interest in this property, to the complainant, to the amount of $2,850 00, and operates as a conveyance to that effect. The character of the litigation now developes just such a case as belongs peculiarly to a Court of equity, to take jurisdiction of and determine. This ward may be delayed in the recovery of her rights, after adjudication by the Courts, interminably by the introduction of new matters arising out of the facts disclosed by the record, unless the Chancellor lays his hands on this property, and compels all parties in interest to come forward and present their respective claims for adjudication and settlement. It would end in the multiplicity of difficulties to refuse now to examine the jurisdiction invoked, and interpose by proper precess to compel a settlement of the interest by decree vested in this ward. And we, therefore, reverse the judgment of the Court below dismissing the bill for want of equity, and direct him to appoint a proper Receiver, who shall take custody of the property, protecting the same from waste and injury, and that all the parties in interest be cited to appear, and be made parties to this bill, and their respective rights and claims be adjudicated, and the property sold for the purposes of division among the claimants.

Judgment reversed.

Hill *vs.* Harris.

B. P. and J. M. HILL, plaintiffs in error, *vs.* C. J. HARRIS, defendant in error.

An injunction to restrain the enforcement of a judgment at law on the ground that there is a good defense to a part of the claim on which the judgment is founded, but said defense did not come to the knowledge of the defendant, until it was too late to set it up at law, ought not to be granted, unless the complainant tender in the bill the amount he admits to be due, and unless the bill clearly show by distinct and positive averments what the defense is, how and by whom it can be proven, and that the failure to acquire the knowledge of it before the trial at law, was wholly unmixed with any negligence on the part of the complainant, or any want of attention to the means of information within the reach of a man of ordinary prudence and discretion.

Equity. Conclusiveness of Judgments. Before Judge HOPKINS. Fulton county. Chambers, January, 1871.

The bill of B. P. and John M. Hill, filed in Coweta county, made this case: In November, 1859, B. P. Hill bought of William Mitchell certain land, and gave him therefor his promissory note for $5,450 00, due the 25th of December, 1860, with John M. Hill and one Dennis as his securities. The note was not paid at maturity. B. P. and J. M. Hill went into the Confederate States army. On the 1st of February, 1863, J. M. Hill paid on said note $2,500 00, in Confederate currency, then much depreciated, and had a credit for that sum entered upon the note. Mitchell died, and his executor pressed Dennis, who was at home, to pay said note.

Dennis, as B. P. Hill's agent, learning that one Harris had Confederate money to loan, said to Harris that, if he would induce said executor to take such currency, on said note, he would borrow it from him, for said B. P. Hill. Dennis & Harris urged upon the executor, that B. P. Hill was a soldier fighting for his country, and he ought to take said currency. And Dennis falsely told the executor that he had sold B. P. Hill's cotton to pay said note. The executor refused. At last, B. P. Hill's mother and sister plied him with appeals to his patriotism, until he consented. There-

upon Dennis, as agent, borrowed from Harris $3,080, in such currency, and gave Harris a note for $3,080 00, signed B. P, Hill's name thereto as principal, Dennis signed it as security and so did said John M. Hill. Dennis then paid the executor the $3,080 00, on the original note, to-wit: on the 13th of March, 1863, when said currency was worth only from thirty to twenty per cent. in specie. B. P. Hill lost heavily by the war, and was compromising his debts after the war. Dennis seemed anxious to be relieved from said securityship on said last note, and Harris was pressing payment. B. P. and John M. Hill neither knew the exact facts concerning this transaction, but relied upon Harris' statements. He said that he had purchased of said executor $3,080 00, interest in said land note and the transaction was exclusively his, and that, when Dennis made said $3,080 00 note, it was simply in renewal of the land note to that extent. Harris was their friend and they had confidence in him. Dennis had become cold towards B. P. Hill, and urged Harris to have him relieved from said note. Relying upon Harris' said statements, which mislead them as to the legal effect of the transaction, B. P. Hill gave his note to Harris for $3,438 37, on the 25th of February, 1867, with John M. Hill as security, in lieu of said note for $3,080 00, and to secure it, gave a mortgage on his land, and the note for $3,080 00, was taken up. Harris foreclosed said mortgage, and sued said last note to judgment in September, 1870. Because they believed said statements of Harris, no defense was made to either of these actions. After these judgments were taken, they learned that Harris had deceived them, but the Court adjourned before they could examine all the records and the witness who could throw light on the transaction, and, therefore, no motion for a new trial could be made. Harris has had *fi. fas.* issued and levied upon B. P. Hill's land, and is about to sell the same. They prayed that the *fi. fas.* be enjoined, and that the judgments be opened and they be allowed to defend said suits upon these facts.

Among the exhibits to the bill, was a suit by the representative of Mitchell's estate, against B. P. and J. M. Hill on the $5,400 00 note, in which suit said note was averred to have been credited by $2,500 00, paid the 14th of February, 1863, and $3,080 00, paid on the 13th of March, 1863, on which they acknowledged since on the 31st of December, 1869.

Judge Bigby being sick, this bill was presented to Judge Hopkins, of the Atlanta Circuit, and he refused the injunction. That is assigned as error.

W. F. WRIGHT, E. S. DOUGLAS, by B. H. BIGHAM, for plaintiffs in error.

HUGH BUCHANON, for defendant.

Facts showing fraud must be averred: 5th Ga. R., 341. They shew no good reason for not defending at law: 1st Kelly, 136; 2d, 279, 329. The new note is binding: 40th Ga. R., 487.

McCAY, J.

We do not doubt but that, according to the statement of facts contained in this record, the plaintiff, in this common law judgment, has not a just right to so much of the same as is in excess of the value of the Confederate money advanced by him. But we are not clear that the complainant is entitled to the benefit of the acknowledged fraud practiced by Harris and Dennis upon the estate of Mitchell. Harris has received, in the credit on his note, the advantage of the payment, as though in gold. If he, still holding to his credit, gets, now, off from Harris by paying only the value of Confederate money, does he not claim the benefit of the fraud, and by adopting it become liable to the Mitchell estate for the money? Besides, if the fraud was really practiced, has not the Mitchell estate a right of action against

Harris for the damages? To make a clear case, even under the facts, the Mitchells ought to be parties to this bill, and a proffer be made to put them right. If Mr. Hill does this, his equity against Harris would be clear, unless he has lost it by his negligence.

A judgment at law ought to be conclusive on the matter in dispute. Such is not only the right of the successful party, but it is to the public interest that litigation shall end. The time of the country has already been occupied by the parties, and it is due to it that they shall not make another draft upon it, if they have negligently used the opportunity previously given them. It is rather extraordinary that Mr. Hill permitted this judgment to go against him, in ignorance of the truth of the case. In the first place, the story, it is said Harris told of his *buying* an *interest* in the note, was extraordinary; such a thing is very unusual, since the buyer has no showing, the note remaining in the hands of the holder. Again, it was Hill's duty, and always in his power to see the note. Indeed, it is apparent that long before this judgment was obtained, he had seen a copy of the note, and had the means of knowing that, in fact, instead of a *sale*, the note was *credited* with the money paid by Harris. But we do not care to go into a discussion of the whole merits of this case. We think the bill does not show that the failure of Hill to set up his defense was unmixed with negligence on his part. The very claim of Harris was suspicious; the fact that he did not have the note, or any showing from the Mitchells, made it still more suspicious, and the fact, which Hill is charged with knowing, that the Mitchell note was *credited*, shows, in our judgment, a degree of carelessness, to say the least of it, in the conduct of Hill that gives him but little claim for an interference with the regular course of law.

We are of opinion, too, that the bill is defective, in not stating by whom this proof can be made, and producing, to the satisfaction of the Court, evidence that the facts are as

stated. Even at law this is required on a motion for new trial, and it will hardly be thought that equity would interfere, by injunction, in a weaker case than is required for a new trial, at law. The amount admitted to be due ought also be offered to be brought into Court. Perhaps if this were done, Harris would be satisfied and the country be saved the expense and trouble of a new hearing. Altogether, we affirm the judgment of the Court in refusing the injunction.

Judgment affirmed.

M. E. KENNY *et al.*, plaintiffs in error, *vs.* J. M. HARWELL, Tax Collector, defendant in error.

M. MEYER, *et al.*, plaintiffs in error, *vs.* J. J. MCGOWAN, Tax Collector, defendant in error.

That portion of the General Tax Act, of 1869, which levies, for educational purposes, a specific tax of twenty cents per gallon on every gallon of brandy, gin, whisky, or rum, whether foreign or domestic, sold by any person in this State, in quantities less than thirty gallons, and which provides the mode by which returns shall be made for each quarter of the sales in *every* year, and fixes the penalty for failing to make the returns required, is within the power granted to the Legislature by Article VI., section 3 of the Constitution, and is not controlled by section 27 of the Bill of Rights. WARNER, J., dissenting.

Constitutional Law. Taxation. Before Judges PARROTT and SCHLEY. From Fulton and Chatham counties. July and August, 1870.

Kenny *et al.*, of Fulton county, and Meyer *et al.*, of Chatham county, filed bills against the respective tax collectors of said counties, averring that the complainants were respectively merchants in the cities of Atlanta and Savannah, and that they had frequently (since the 1st day of January, A. D., 1870,) sold brandy, gin and whisky in quantities less

than thirty gallons; that the said defendants, as tax collectors of the said counties, had called upon the complainants, respectively, to make returns of all liquors sold by them since the 1st day of January, A. D., 1870, and up to the 1st day of April, 1870, in quantities less than thirty gallons, and were about to issue executions against each of the complainants for the sum of $1,000 00, for his failure to make such returns, and threatened to continue to require them to make such returns on the 1st days of July, October and January thereafter, and to issue similar executions upon their failure to make such returns.

The bills further alleged that the said tax collectors were proceeding under the "8th paragraph of the 2d section of an Act, approved March 18, 1869," and entitled "An Act to levy and collect a tax for the support of the government, for the year 1869, and other purposes," which said paragraph was as follows: "There shall be levied a specific tax, for educational purposes, of twenty cents a gallon on every gallon of brandy, gin, whisky, or rum, whether foreign or domestic, which is sold by any person in quantities less than thirty gallons, in this State; and the amount sold shall be given in under oath. Quarterly returns shall be made on the 1st days of April, July, October, and January, in each year, by all persons within the county who sell liquors in quantities less than thirty gallons, of the amount sold the preceding quarter. Said returns shall be made to the tax collector of the county, who shall demand and collect the tax due, when the returns are made. It shall be the duty of the tax collector to require all persons selling said liquors to make their returns and pay the tax thereon, and if any person shall fail or refuse to make his return and pay said tax, he shall be assessed, by the collector, a specific tax of $1,000 00, and the collector shall proceed to collect the same by execution, as in other cases of taxes due and unpaid; to go in effect from and after the 1st day of January, 1869." And the complainants in-

sisted that the tax collector could not proceed under this clause of the said Act.

The prayer of the bills was for the writ of injunction to restrain the tax collectors from proceeding, as alleged, to collect the tax specified, and for general relief.

The argument on bill from Fulton was before Judge Parrott, and on the one from Chatham, before Judge Schley. Both bills were dismissed, on demurrer, for want of equity. And this is assigned as error. They were argued here separately, but the Court consolidated them in delivering the opinion.

HULSEY & TIGNOR, for Kenny *et al.* R. E. LESTER, for Meyer *et al.* The 8th paragraph of section 2, of Act of 1869 (quoted above) is unconstitutional: 27th section of Bill of Rights, 1868; Constitution 1868, Article VI., sec. 3d. Equity can restrain these tax collectors: R. Code, secs. 3026, 3027, 667, 3040, 3045; 27th Ga. R., 354. Power to tax is power to destroy: 4th Wheat. R., 316. *Congress* may regulate commerce: 7th Howard R., 283; Law Times, 197. Constitution subordinate to Bill of Rights: 11th Ark. R., 484; 13th, 267; 11th Mo. R., 13; 2d Yerger R., 605; 3 Humph. R., 483; 11th Mass. R., 396; Livingston vs. The City of Albany, 41st Ga. R., 21. The Act of 1869, in said quoted section, contains matter different from its title: Constitution 1868; 5th Par., sec. 4. The $1,000 00 is a penalty.

J. D. POPE, for tax collectors.

McCAY, J.

Section 27, Article I., of the Constitution of 1868, is as follows: "The power of taxation over the whole State shall be exercised by the General Assembly only to raise revenue for the support of the government, to pay the public debt, to provide a general school fund, for the common defense, and for public improvement. And taxation *on property*

l be *ad valorem only* and *uniform upon all species of erty taxed.*" Article III., section 5, paragraph 1, is as ws: "The General Assembly shall have power to make ıws and ordinances, consistent with this Constitution and epugnant to the Constitution of the United States, which shall deem necessary and proper for the welfare of the ." Article VI., section 2d, after devoting to the pur- of common schools, the poll tax and certain other , proceeds to devote to that purpose "a *special* tax on s and exhibitions, and *on the sale of spirituous and malt* rs, which *the General Assembly is hereby authorized to* s."

ıe Legislature of 1869, in its General Tax Act, after g property generally, undertook to assess the tax pro- l for in Article VI., section 2d, by laying, for purposes ucation, a tax of twenty cents per gallon upon the sale ıisky, brandy, etc., in quantities less than thirty gallons. contended that this tax is a tax upon *property*, and that, taxes the sale of these liquors twenty cents upon *each* a sold, without regard to its value, it is not *ad valorem* uniform, as required by Section 27, Article I., of the titution.

this a tax upon property? This Court, in the case of *City of Albany*, at the last term, held that a tax laid by ity of Albany, of fifty cents upon every mule sold in ity by drovers, was a void tax, because it was a tax upon *rty*, and not *ad valorem;* and, though upon reflection, atly doubt whether that decision was right, upon the ıd on which it was put, I am not disposed to disturb it. e tax in that case was a tax upon property, it was, in ıdgment, void, not only because it was not *ad valorem*, ecause it was not *uniform* upon all species of property . It selected a certain kind of property, and taxed *that* ently from other property, and hence the tax, whether le or *ad valorem*, was not a uniform tax on all species of rty taxed. The opinion expressed in that case, that the

city might tax the sale of mules *ad valorem*, was not a point in the case before the Court, nor properly involved in the decision of it.

That a tax upon the sale of an article is a tax upon the article, as property, *is*, however, *decided* by that case, and whether rightly or wrongly, this Court is, under section 204 of the Code, required to adhere to it, until it is overruled in the manner there prescribed. I do not, therefore, put my judgment in this case on the ground that this is not a tax upon property.

For the purposes of the argument, it may be admitted that this is a tax upon property, and that it is neither *ad valorem* nor uniform—that is, it is not laid according to the value of the thing taxed, and that the tax is a tax not laid upon other property. It is, in my judgment, nevertheless, strictly a constitutional tax. The power to lay it is derived from Article VI., section 2d, of the Constitution. It is an express power, and the Act conforms to the very terms of the grant. That section devotes to the common school fund "a special tax on shows, exhibitions, etc., and *the sale of spirituous and malt liquors—which the General Assembly is hereby authorized to assess.*"

In my judgment, it was the particular intent of this clause of the Constitution, to authorize a tax which should *not* conform to the requirements of Section 27 of Article I—that is, to authorize a tax upon these particular things which should not be *ad valorem*, and should not be uniform with the tax the Legislature might lay upon other property.

I can see no other motive for this special grant to the Legislature of a power to lay a tax on the sale of spirituous liquors. I cannot escape the thought, that this authority was here given because it was supposed that if such a grant was not inserted, some other portion of the Constitution would make the tax here devoted to education illegal.

It must be remembered that the taxing power in the General Assembly is no where expressly granted, except in this

clause. The taxing power, the Legislature has, under its general power, to do all things consistent with the Constitution. Why was it supposed necessary to insert in Article VI., section 2, an authority to lay a special tax upon the sale of spiritous liquors? In my judgment it was but for one reason: Such a tax would not be *ad valorem*, and would be a violation of the principle asserted in Article I, section 27th, as to uniformity. It authorized a tax upon a particular kind of property, and authorized that tax to be a special one. It was, therefore, thought necessary to give the General Assembly *in terms*, the power to assess it.

To say that the tax to be assessed under Article VI., section 2d must conform to the provisions of Article I, section 27, is to make the grant of power in Article VI., section 2d wholly unnecessary, as the General Assembly would have the power without this special grant. The taxing power, so far as the mode of its exercise is concerned, is unlimited, except as it is limited in Article I., section 27th; and if the power granted in Article VI., section 2d is only to be exercised as limited in Article I., section 27th, then the grant in Article VI., section 2d is wholly useless. The words are surplussage—they grant a power which existed without them. I do not so understand the Constitution. Article VI., section 2d was intended to make the tax then devoted to education an exception to the general rule laid down in Article I., section 27th, and unless it means this it was a mere waste of words. A tax upon sales, *so far as it is a tax upon the property sold*, cannot, from the very nature of it, be a tax according *to the value of the property.* A gallon of liquor may be worth $1 00, and be sold in the course of a year half a dozen times. Another gallon may be worth $5 00, and not be sold at all. It is absurd to say such a tax is *ad valorem* on the property.

Suppose now, this tax, instead of being a tax of twenty cents per gallon, were a tax of twenty per cent. on the value of each gallon sold. Here is a man who has a barrel of brandy. He sells it; it is resold; it is then retailed. It

pays three taxes of twenty cents. It is absurd to speak of such a tax as an *ad valorem* tax upon the property, as a tax according to the value of the thing taxed. Two things of precisely the same value pay a different tax, and a thing worth $1 00 pays a greater tax than one worth $2 00. The truth is, a tax upon the sale of a thing *cannot be* a tax upon the value of the thing, or a tax of the thing according to its value. It is and must be a tax upon the thing, not acording to its value, but according to the number of times it is sold.

From the very nature, therefore, of this grant to tax *the sale* of spirituous liquors, from the very terms used, it follows that Article I, section 27th, is not to control it, since property *cannot* be taxed *ad valorem* by taxing the sale of it. You may tax *the sale* according to the value of the property sold, but it is *impossible* to tax *property* according to its value, by taxing the sale. It must happen that property of the same value will pay different taxes, and it will happen that property of a lower value will pay more tax than property of a higher value, simply because it may be oftener sold.

The framers of the Constitution did not intend by section 27th of Article I., of the Constitution simply to fix a mode of *computation*. The idea was that all kinds of property taxed should be *burdened* according to its value, and that this burden should be uniform on every species of property taxed, according to the value thereof.

A tax upon the sale of property is a violation of this fundamental principle, so far as it is a tax upon property at all, since, in the very nature of the case, it is sure to happen that one kind of property will be sold oftener during the year than another. Such a tax *can* be neither uniform nor according to value. The framers of the Constitution felt this, and when they devoted a special tax, upon the sale of liquor, to education, they felt that, as such a tax, it could not, in its very nature, be a tax upon the property, according to its value; and they granted, *in express terms*, *power* to the Legislature to lay *such a tax*, notwithstanding the limitation

they placed, as a general rule, on the taxing power by section 27th of the Bill of Rights, to-wit: Article I. The Constitution is to be construed altogether; one part of it is just as high in dignity as another. And where, in Article VI., it grants a power to tax the sale of liquor, by a special or specific tax, it intends to grant a power, exceptional in its character, and not controlled by the limitation upon the general taxing power contained in Article I., section 2d. This, as I understand it, was the *sole purpose of the grant*—this was a necessity; for a tax upon the sale of property, so far as it *is* a tax upon the property, cannot, in its very nature, be a tax, according to the value of the property.

It is clear, therefore, to my mind, that the tax upon the sale of spirituous liquors of twenty cents per gallon on each gallon sold, is a tax which the General Assembly is specially authorized to assess, and that the very object and intent of the Constitution, by Article VI., section 2d, was to grant a power, not controlled by the limitation upon the general taxing power, contained in Article I., section 27.

Article I., section 27, applies to taxes upon property generally. Such taxes must be *ad valorem* only; that is, they must be burdens upon the property in proportion to its value, and in addition, the taxes must be uniform upon all species of property taxed. That is, that, whilst certain property may be exempt entirely from taxation, the Legislature shall not tax one kind of property at one rate, and another kind at another rate. But the tax on liquors, or on the sale of liquors, was intended to be an exception to both these rules. The Tax Act of 1869, though its title, is: "An Act to levy and collect a tax for the support of the government for 1869, and for other purposes," in the body of it, and, indeed, in this very clause, clearly provides that the specific tax laid shall be laid from year to year. Indeed, this is our mode of passing tax laws. The Code points out, in general, the *subjects of taxation*, and fixes the list of specific taxes. The tax is assessed upon this according to the appropriations. The

main body of the tax laws, including the list of specific taxes, remain, from year to year, the same, unless altered by legislation.

We see nothing in the provision for the continuance of this tax, or rather in the implication in section 8th, that it shall continue, that is different from the title, as all our tax laws continue until altered. Such has, for years, been our system, though there were variations from year to year being, in fact, alterations of the Code, and unless they are themselves altered, they will continue.

For myself, I do not see why these cases do not fall within section 3618 of the Revised Code. If this is not a call for judicial interference, in the collection of the revenues of the State, I am not able to imagine a case.

The case in 33*d Georgia*, 623, is exactly such an one as this. There it was claimed that the tax was illegal—such an one as the Legislature had no power to assess. Yet the Court unanimously held, that a Court of Equity could not interfere by injunction. It is attempted to say, that this section of the Code cannot apply if the bill insists that the Act laying the tax is unconstitutional. But there is no such exception in the Code.

It is claimed that the Constitution expressly provides that the judiciary shall declare unconstitutional laws invalid. True. But does it follow that it may do this by injunction against the officer who is collecting the tax? The Code expressly says that, notwithstanding the provision against judicial interference, the party may have the proper proceedings at law for redress. He may sue the collector. But he must pay the tax. The Government is not to be stopped, by its own Courts, in the collection of its revenues.

This has been the law of this State since 1804. It is the law of the United States, where the judiciary has the same power over unconstitutional laws as has the judiciary of this State, and it is a law founded on a sound public policy.

Judgment affirmed.

OCHRANE, C. J., concurring.

his question comes before the Court under the Act of 9, and involves the constitutionality of the Act of the islature taxing persons for the sale of liquors in quanti- less than thirty gallons, in the amount of twenty cents gallon, on every gallon sold. The first point raised on Act of 1869, is, that it is limited by its title to taxes ssed only for that fiscal year. We do not deem it neces- to enter into any discussion in relation to this point, as eel satisfied the Act remains in force until altered, modi- or repealed by the Legislature. The main question in case arises under the construction of the declaration of ts, section 5102 of the Code, which declares that "taxa- on property shall be *ad valorem* only, and uniform on all ies of property taxed." If the provisions of the Act of 9 are held to be a tax on liquor as property, then it is eded such tax, to be *ad valorem*, must refer to the value, such Act in its terms would be a violation of the Consti- on. By section 5217, the Constitution authorizes a special on the sale of spirituous and malt liquors, and is, there- , not within the constitutional provision of *ad valorem* tax- n. The Act of 1869 imposes, for educational purposes, a of twenty cents per gallon on every gallon of brandy, gin, sky, or rum, either foreign or domestic, which is sold by person in quantities less than thirty gallons, in this State. his a tax upon the property, or upon the sale of the prop- ? If upon the property, it is unconstitutional; for all perty must be taxed *ad valorem*. If a tax upon the sale, it is constitutional; for a tax on sales is authorized by Constitution and may be specific, and not *ad valorem*. opinion is, that it is a specific tax on sales within the er of the Legislature to impose, and the mode of its col- ion may be enforced as provided for in the Act and the usage of the law upon failure of the party making his rn, fixing the amount of the assessment at such sum as

the basis of the amount of tax due, and may be levied and collected by tax-collectors under the usual forms of law. And for these reasons I concur in the judgment of the Court.

WARNER, J., dissenting.

This was a bill filed by the complainants against the Tax Collector of Fulton County, praying for an injunction, to restrain him from assessing a specific tax of $1,000 00 against each of them, for failing to return and pay the tax imposed by an Act of the General Assembly, passed on the 18th day of March, 1869, which provides for the laying a *specific* tax for educational purposes, of twenty cents per gallon, on every gallon of brandy, gin, whisky or rum, whether foreign or domestic, which is sold by any person, in quantities less than thirty gallons in this State, on the ground, that said Act is in violation of the Constitution of 1868. On the hearing of the case, the Court below dissolved the injunction and dismissed the bill for want of equity, to which the complainants accepted. The 27th section of the I. Article of the Constitution declares, that "taxation on property *shall be ad valorem only*, and *uniform* on all species of property taxed." The 3d section of the VI. Article of the Constitution authorizes the General Assembly to assess a special tax on shows and exhibitions, and on the sale of spirituous and malt liquors, for educational purposes. That the General Assembly have the power and authority, under the Constitution, to assess a special tax on the sale of spirituous and malt liquors, is not disputed; that spirituous and malt liquors are one species of property, cannot be denied. In what manner, then, according to a fair construction of the Constitution, is this special tax on the sale of this species of property to be assessed? Is it to be assessed *ad valorem*, on each gallon sold, or is a *specific* tax to be imposed on each gallon sold, without any regard to its value? In other words, has the General Assembly the power and authority, under the Constitution, to impose a *specific* tax of twenty cents per gallon on every gallon sold, regardless of

ze thereof. It is conceded, that the General Assembly not tax it as *property*, otherwise than *ad valorem.* If on what principle can the General Assembly tax *the* that property, otherwise than *ad valorem*? Whether ous or malt liquors are taxed as one species of property, ther the tax is assessed on *the sale* of that species of ty, the burden of taxation, whatever it may be, falls *hat property;* and unless the tax imposed be an *ad* a tax, it will not be a *uniform tax*, as required by the tution.

argument, that there is a distinction between taxing ous and malt liquors *ad valorem* as property, and the the sale thereof by a different mode, is too refined and y to receive the approval of my judgment. If the l Assembly had imposed a tax of twenty cents on *the* f each gallon sold, or on the value of the gross amount ituous and malt liquors sold by any person, then it have been a lawful tax under the Constitution, but the poses a *specific* tax of twenty cents per gallon on every of brandy, gin, whisky, or rum, sold by any person, in ties less than thirty gallons, without any regard to *the hereof.* The mandate of the Constitution is, that tax- n property shall be *ad valorem only*, and *uniform* on cies of property taxed. And the same principle of n should be applied to property when sold—that is to hen the General Assembly assess a tax on the sale of ous and malt liquors, that assessment must be made rem in order to make it *uniform.* If one man sells g but brandy, worth $10 00 per gallon, and another othing but whisky, worth $2 00 per gallon, and each pay a *specific* tax of twenty cents on each gallon sold, t any regard to *the value* thereof, the tax would not be m; the burden of the tax would operate *unequally* those who sold spirituous and malt liquors. And, re, the Act violates the principle ordained and estab- by the Constitution for the assessment of taxes, either

on property or the sale thereof. If it is a correct principle of taxation, that it shall be *uniform* on all species of property taxed, why should not the tax be *uniform* on the sale of any species of property? In the case of *Livingston vs. The City of Albany*, decided at the last term of this Court, it was unanimously held, that a *specific* tax of one dollar per head on each mule or horse *sold* by drovers, was void under the provisions of the 27th section of Article I. of the Constitution of 1868, on the ground that such a tax was not an *ad valorem* tax; as one of the animals sold might be worth $100 00 and another $500 00. The principle decided in that case is applicable to, and must, in my judgment, control this case. In that case, the *ad valorem* principle of taxation was applied to *the sale* of property, by drovers, so as to make it operate *uniformly* upon that class of traders.

The complainants do not seek, by their bill, to enjoin the collection of any execution or distress-warrant issued for taxes, but to enjoin the collector from assessing a specific tax of $1,000 00 against each one of them for failing to make returns and pay a tax which is *unconstitutional* and *void*. In other words, they say that there is no tax due, as claimed, either under the provisions of the Code or any other law. Clearly, the tax claimed does not arise under any provision of *the Code*, which prohibits any judicial interference. I am, therefore, of the opinion that the judgment of the Court below, dissolving the injunction and dismissing the complainants' bill, should be reversed.

ULLATT, *prochien ami* of MRS. BARNES, plaintiff in
or, *vs.* JOHN J. THRASHER *et al.*, defendants in error.

J. THRASHER *et al.*, plaintiffs in error, *vs.* H. GUL-
TT, *prochien ami* of MRS. BARNES, defendant in error.

is error in the Judge of the Superior Court to dismiss a bill in
ation, except upon demurrer by the defendant.
e fact that a partnership engaged in the foundry business, took and
cuted a contract with the Confederate Government, to furnish cer-
munitions of war, is not of itself sufficient to so vitiate the genera
ceeds of the business, as to render illegal a note given by some of
members of the firm to others, even though the note be based upon
proceeds of the general business.
here the equity of the bill is denied by the answer and accompany-
affidavits, this Court will not disturb the judgment of the Court
ow in dissolving the injunction.

quity Practice. Injunction. Before Judge PARROTT.
nbers. Fulton County. August, 1870.

he bill of the next friend of Mrs. Barnes made this case
nst James E. Gullatt, as administrator of William Barnes,
plainant's husband, and J. J. Thrasher, and other nomi-
parties. In October, 1862, James E. Gullatt, Rhodes
William Barnes, styled Gullatt & Company, agreed with
sher as follows: Gullatt & Company and Thrasher were
sociate in the machine and foundry business; the amounts
e put in by the firm and by Thrasher were fixed; the
was to have half the profits and bear half the losses,
Thrasher the other half. This firm was to last three
, unless sooner dissolved by consent, and at the end, the
erty was to be equally divided between the firm and
sher. One Harris was to represent Thrasher at Thrash-
expense, keep the books, and make contracts for the new

They were to work only for cash, except on "gov-
ent work," and have settlements quarterly. Gullatt,
les & Thrasher signed this contract, and Gullatt signed
es' name thereto. Barnes was then a soldier in the Con-

federate army; had left one Mecaslin as his sole agent, and Gullatt had no right to sign his name to said contract.

To carry out this contract, these parties bought out Dunning's foundry, in Atlanta, Georgia, and contracted with the Confederate government to furnish it with implements of warfare, Gullatt signing Barnes' name thereto, without authority. They carried on the business till December, 1863. They then had a disagreement, because Thrasher, instead of advancing money, as he had promised, individually, had borrowed money in the firm name, and owed the firm about $14,000 00. They stopped business awhile, because of this misunderstanding. Upon Harris' statement, it appeared that the firm owed Thrasher $12,123 00, and for that amount a note was given to Thrasher, dated the 15th of December, 1863, and due one day after date, signed by Gullatt, Rhodes and Barnes. Gullatt signed Barnes' name to said note, without authority, although Mecaslin refused to sign Barnes' name thereto, which was known to all the parties. Barnes received no consideration for this note, and knew nothing of it. If any, it was working for the Confederate States, in making war material, and the note is therefore void. In 1864, Barnes died. In 1865, Gullatt administered upon his estate. In March, 1866, Thrasher and Gullatt submitted the matters of difference between them to arbitration. The arbitrators determined upon said note, finding nothing against Barnes' estate, and that Gullatt owed Thrasher only $327 97. The submission is not exhibited. An award by two arbitrators, as to a matter submitted by "J. J. Thrasher and James E. Gullatt" was, that the settlement of December, 1863, disposed of matters prior thereto; that Gullatt owed now to Thrasher $327 97, upon payment of which Gullatt was to be discharged from said note of 15th December, 1863, and from another note, for $1,467 67, to Thrasher, made by Gullatt and Rhodes in December, 1863. Thrasher refused to abide by this award. Subsequently, Thrasher and Gullatt, intending to defraud Barnes' estate, on the 15th of April,

', made a contract, whereby Gullatt, as administrator of ıes, agreed to pay Thrasher $600 00, three months after date, and Gullatt, individually, promised to pay him) 00, in compromise of said note for $12,123 41, and her on Gullatt, individually, for $1,200 00, dated the of January, 1864, and due the 5th of February, 1864. att guaranteed the payment of this $600 00 note.

ullatt had no authority thus to bind Barnes' estate, and a his securities on his administration bond found he had ted, they notified the Ordinary that they would no lon- tand his security. Gullatt has given no other security, is insolvent. Thrasher sued Gullatt, as administrator of ıes, on said $600 00 note. Gullatt made no defense, sher obtained a judgment, and has had the *fi. fa.* issued ı it, and levied upon Barnes' property. Mrs. Barnes r nothing of all this till the sheriff notified her of said . The prayer was to enjoin said *fi. fa.*, and set aside judgment, etc. There being no Judge for the Atlanta uit, Judge Parrott granted the injunction.

he defendants answered the bill. Rhodes' answer is not rial, as the real fight was with Thrasher. He answered Barnes knew of the purchase of the foundry, and being me on furlough, learned what had been done and fully oved of it all, ratified Gullatt's signature of his name to ontract, accepted his share of the profits of work done he Confederate States and others. Barnes, in person, need some of the money to pay for the foundry and :, and fully recognized Gullatt as his agent, as to the dry business. Thrasher never gave the firm notes, ex- for firm stock. He never was a defaulter, nor owed the anything. After said disagreement, it was ascertained Thrasher had paid most of the $50,000 00 given for oundry, and the firm owed him $12,123 00 of the pur- -money, and for this, said first note was given, and ı Barnes came home, he ratified Gullatt's signing his : thereto. The reason why the others resumed the busi-

ness may have been to avoid conscription, but that was not Thrasher's reason. After Barnes' death, his interest in the foundry was sold at $1,800 00, and Mrs. Barnes got the money, in good currency. Gullatt promised to pay the $600 00 note out of the proceeds of that sale, but did not.

There was no submission to arbitration of any claim, except Thrasher's against Gullatt individually; Gullatt brought in cross-claims and reduced the recovery. One of the arbitrators told Thrasher he did not understand the matter when the award was made. Thrasher refused to be bound thereby, and subsequently he and Gullatt compromised in April, 1867. The compromise as to Barnes' estate was ratified by the Ordinary of the county. Rhodes relieved himself from said note by paying Thrasher $1,500 00 after Mrs. Barnes got said $1,800 00. The last obligation taken on Gullatt, and Gullatt, as administrator of Barnes, was for the like consideration as Rhodes' obligation, to-wit: said first note of $12,123 00. He insisted that his note for $600 00 was for the purchase-money of the very property for which Mrs. Barnes received said $1,800 00.

Gullatt answered that the consideration of the $12,123 00 note was Thrasher's agreement to assume and pay $1,4000 00 which the firm owed; that the profits of the firm paid the purchase-money; that from the beginning of the business they made shot and shells for the Confederate States, and got pay therefor. He denied that Barnes knew that he signed said note or ratified it afterwards. He said he intended defending against said suit but forgot when to plead.

Upon the coming in of these answers Thrasher moved, in vacation, to dissolve the injunction. At the hearing various affidavits were read in support of the bill, and Thrasher's answer respectively.

The Judge dissolved the injunction and dismissed the bill. Complainant's solicitors sued out a bill of exceptions, averring that Thrasher moved to dissolve the injunction *and dismiss* the bill, and that the Judge erred in granting the mo-

tion. He certified this bill of exceptions to be true. That made one case here.

Thrasher's solicitors sued out another bill of exceptions, averring that they moved only to dissolve the injunction and that the Judge wrote an order simply dissolving the injunction; that complainant's solicitors then asked whether he would dismiss the bill, to which he replied in the negative; after consulting with complainant's solicitors, the Judge determined to dismiss the bill that the cause might end, as he had determined that there was no equity in the bill and that this decision might be reviewed by the Supreme Court, and changed the order. Thrasher's solicitors say the Court erred in dismissing the bill when they had not moved to dismiss it; in holding private consultation with complainant's solicitors, and changing his order at their instance, and in certifying that a motion to dismiss the bill was made when none was made. This bill of exceptions duly certified, made the second case. They were argued and decided as one.

HULSEY & TIGNOR, for Mrs. Barnes.

THRASHER & THRASHER, for Thrasher.

McCAY, J.

The powers of a Court of Equity are in the Superior Court. Though, in many respects, the Judge acts independently of the jury, yet, it is while he is upon the bench, and during the session of the Court, that his functions are performed. His powers during vacation are exceptional, and generally are specially pointed out by law: Revised Code, 3150, 3151. With the exception of that jurisdiction exercised by the Court in the protection of trust-estates, and the property and person of wards in Chancery, (Code, 4162,) there are but few acts which the Chancellor may perform in vacation, except acts to preserve things *in statu quo* until a hearing, and orders in reference to process; and, as a general rule, these

powers are specially granted by statute. The Act of 1869, pamphlet 136, allows a Chancellor to hear and determine a *demurrer* in vacation, and prescribes how it shall be done.

1. In this case there was no demurrer; the complainants did not have any notice of a demurrer. The motion was to dissolve the injunction. It is true that the equity of the bill is involved in this motion; but the uniform practice, in this State, has been, on a motion to dissolve, to let the bill stand, even though the injunction be dissolved for want of equity. We have no doubt, too, that there is equity in this bill. If its charges be true, the whole of this foundry business contract was unauthorized, and all the proceedings of this administrator, in reference thereto, void and a fraud. It is true the answer and affidavits very completely negative this charge, as to the want of authority, but it is not for the Judge to determine, finally, the issues made by the parties. That is the province of a jury.

2. As to the question, so elaborately argued, whether the note, out of which grew the judgment sought to be enjoined, was for part of the purchase-money for the property bought, or was mixed up with the proceeds of the enterprise, we do not see its importance. If there be no fraud nor illegality in procuring the judgment, (and that question must be held concluded by the judgment,) and if that is assumed, then we do not think that the *mere* fact that a *portion* of the company's profits came from work done for the Confederate government, so vitiates the fund as to make a note founded on a division of that fund illegal. If the *enterprise* was for the purpose of making this war material, and it could be made distinctly to appear that this was a contest over the results of this illegal enterprise, there would, perhaps, be point in the position taken by the defendant.

3. Taking the answer and affidavits together, we think the Court committed no error, justifying our interference, in dissolving the injunction. Under the rule we have so often

id down, he has a large discretion in such cases, which we ave no right to control unless his discretion be abused.

We therefore reverse the judgment dismissing the bill, nd affirm the dissolution of the injunction.

. WALLACE, Superintendent Western & Atlantic Railroad, plaintiff in error, *vs.* JOHN W. CASON, defendant in error.

Where, upon the trial of a case, a presiding Judge granted a non-suit, stating at the time he was not satisfied with the argument of the legal question upon which such non-suit was awarded, and would grant leave to move to reinstate the case, on the argument of which motion he would decide the question, and the counsel for defendant entered the judgment of non-suit on the minutes, and plaintiff's counsel drew up the motion to reinstate, reciting therein such leave granted as aforesaid, upon which motion the defendant's attorney acknowledged service, and the motion was put on the docket at the same term, there being no entry of it filed by the Clerk thereon, or brief of evidence filed:

Held, That it was not error in the Court to hear the motion to reinstate, as it stood upon the docket, and that the motion to reinstate, under the facts of the case, differed from a motion for a new trial, and did not require the formalities or requirements of such motion.

When, under the facts just recited, and on the hearing of such motion, counsel moved to amend the minutes of the Court, so as to make them conform to the leave granted to move to reinstate, and the fact being undisputed, as well as sustained by the testimony of the presiding Judge:

Held, That it was not error in the Court below to allow the amendment *nunc pro tunc*, under the established principles of law, embodied in the Code, sections 294 and 3449.

Held again, Where the Court, in an action for damages brought against a railroad for killing stock, when the sum sued for was over the Justice's jurisdiction, and the suit was instituted in the county of defendant's residence, and not under the section 2988 of the Code, granted a non-suit on account of the absence of proof of the notice required by such section of the Code, that such decision was error; as the Superior Courts of this State have original and general jurisdiction in such cases, and the special remedy given by the Code is cumulative merely; and it was proper in the Court below to reinstate the case on the determination of this legal question.

Non-suit. New Trial. Amendments. Suits *vs.* Railroads. Before Judge LOCHRANE. Fulton Superior Court. September Term, 1870.

Cason sued Wallace, as Superintendent of the Western & Atlantic Railroad, for killing his horse, by running an engine upon him. In November, 1869, Judge Pope, presiding, dismissed the case, and so entered upon his docket, and a non-suit was entered upon the minutes. At the same term, Cason's counsel made out a motion to reinstate the case, had it entered upon the motion docket and got an acknowledgment of service from defendant's counsel, they reserving the right to object to the application. No brief of the evidence was filed, nor was the motion entered filed by the Clerk.

At the next term of the Court, this motion came on for hearing, before Judge Lochrane, Judge Pope's successor. Cason's counsel offered to show by Judge Pope that when he dismissed said cause, he gave leave to move to reinstate it. This evidence was heard over defendant's objections. Thereupon, the Court allowed an entry made upon the minutes granting leave to move to reinstate the cause *nunc pro tunc*. This was objected to. The Court would not hear what evidence was had on the trial, but allowed Cason's counsel to read so much of certain interrogatories as would show how the points arose. This was objected to.

The motion to reinstate was heard upon the ground that the Court erred in granting the non-suit, because plaintiff did not show that he had given notice of said killing, as required by the Act of 1854, etc. The Court reinstated the case. This and the overruling of said objections, are assigned as error.

MYNATT & DELL, for plaintiff in error. Parol cannot change record: 1st Kelly, 485; 8th Ga. R., 201. Amending records: R. Code, sec. 3449; 10th Ga. R., 183. Entry on dockets no evidence of proceedings: 1st Kelly, 252, 367;

4th, 157. Motion to reinstate same as motion for new trial: 5th Ga. R., 273; 30th Ga. R., 191, 249, 674; 29th, 109; 28th, 74; 12th, 431; 2 Tidd's Pr., 794, 811, 216; 3 Wils., 146, 338; 2 Blackf. R., 698; 4 Burr R., 1986. What is filing, and how proved: 15th Ga. R., 484. Brief of evidence necessary: R. Code, sec. 3668; 2 Tidd's Pr., 813; 28th Ga. R., 74; 29th, 109. Leave granted gave no additional right: 29th Ga. R., 109; 28th, 74. The notice required by Act of 1854 was necessary to plaintiff's cause: 18th Ga. R., 249; 26th, 1121; Acts of 13th and 18th April, 1863.

HILLYER & BROTHER, for defendant. Amending records: R. Code, secs. 194, 3448, 3449. No brief of evidence necessary: R. Code, sec. 2881; 2d Bouv. L. Dic., 221; 1st, 679; Hilliard on N. Trials, and 49th Rule of Court. Remedy by Act 1854 only cumulative: 24th Ga. R., 363; 1st Kent Com., 518, note; 5, 16, note g; 3d Hill's R., 472; 11th Ga. R., 56, 63; 10th Mod. R., 118; 1st Kelly, 530.

LOCHRANE, C. J.

The defendant in error in this case brought his action in the usual form against the Western & Atlantic Railroad for damages arising out of the alleged killing of a horse, which came on for trial at the November Term, 1869.

The presiding Judge held that the failure to give notice, under the Act of 1854, and the Amendatory Act of 1863, relative to the killing of stock by railroads, prevented a recovery, and that he would grant a non-suit with leave to the party to move to reinstate, upon which motion he would hear the argument of the legal question involved.

Counsel for the railroad placed upon the minutes of the Court the order of the non-suit granted, and plaintiff below, by his counsel, made out the motion to reinstate at the same term of the Court, upon which service was acknowledged, and the motion was placed on the motion docket at that

term. The motion did not have any entry upon it, of *filed by the Clerk of the Court*, and no brief of evidence was filed, agreed upon, or waived. The presiding Judge at the trial having resigned, another was appointed, before whom, at the Adjourned Term, 1870, this motion to reinstate was heard and determined, and whose judgment and rulings upon the hearing is alleged as error.

1. The first objection legally urged is to the effect, that as this motion stood, there was in law no proper motion of which the Court could take cognizance. This objection is based upon the idea, that except the motion was filed, it could not be entertained by the Court, and that a motion to reinstate was analogous to a motion for a new trial, and there being no brief of evidence filed at the first or trial term of the case, that it had nothing to support it, and should be dismissed.

We do not consider the objection good on either ground. A motion to reinstate the case was placed upon the docket at the proper time, and was served upon the party. The grounds were stated in the motion, of which he had notice, and it was not such a paper as the law required to be entered upon the minutes by the Clerk. It was properly docketed and served, and the failure to enter "*filed in office*" by the Clerk upon it could not invalidate it. There was sufficient notice of such motion pending to the opposite party, and the matter, upon *motion* to *reinstate*, stood upon the docket of the Court to be disposed of in its order.

As to the second ground, that a motion to reinstate a case is equivalent to a motion for a new trial, and requires the same formalities, we do not generally regard the requirements of motions for new trials and motions to reinstate as the same in law. A motion to reinstate a case generally follows its dismissal by the Court. It is an act of the Judge that is not final, and within his discretion, and except in a flagrant case of abuse, where rights had been acquired by delay, not the subject-matter of review.

To illustrate, in a case pending, the Court holds the declaration insufficient, and afterwards changes his opinion. If the case was dismissed, he would, of his own motion, reinstate it without any intervention of parties, or if he dismissed a case for want of prosecution, and found afterwards providential causes prevented the party from proceeding, it would be his duty to reinstate it without the filing of a paper, and leaving but the record of his act on the minutes of his Court.

In cases of non-suit at the instance of defendant, upon the insufficiency of evidence, a motion for a new trial is the proper mode of bringing the question before the Court. There are cases when a voluntary non-suit has been taken by plaintiff, and upon a motion to set aside the *non-suit* the Court has entertained the motion and decided it. But where, on a demurrer to the plaintiff's evidence, the defendant demands the judgment of the Court, and the Court decides, sustaining such a demurrer, and awards a non-suit, such judgment upon the evidence is reached by a motion for a new trial; or the defendant, if such judgment be against him, may go on with his evidence to the jury.

The grounds and *manner* of the *non-suit* are important in the application of the rules by which it may be afterwards adjudicated. For, while we find the classification of verdicts and non-suits as to matter of law granting new trials, we find, on the other hand, the classification of non-suits and dismissals as to questions arising upon motions to set-aside and reinstate. In the case at bar the original paper containing the motion to reinstate, upon which the service was acknowledged, recites the fact of leave of the Court granted at the time the non-suit was awarded to move for the reinstatement of the case, and the entry of the Judge upon the docket at the time of the granting of the non-suit was, "dismissed." True, entries on the dockets are not intrinsically such solemn evidence as the minutes of the Court. But in view of the

after proceedings in this case they may be stated in connection with what transpired.

At the time this non-suit was awarded the Judge stated that he was not satisfied from the argument of the legal question made, and desired, before the case was finally disposed of, to hear the matter farther, and that with such purpose he awarded a non-suit, stating he would grant leave to make a motion to reinstate the case, and upon hearing such motion would decide the matter.

2. When motion was made to enter such leave to move to reinstate the case *nunc pro tunc*, the counsel objected, and the next question, and an important one, is the right of the Court to allow such amendment. The delay in this case, we may remark, originated in the fact that the Judge resigned, and the Circuit remained for a long period without any judicial officer; and, in view of the circumstances, we do not think that any injury could arise to the movant.

The Code, section 194, tersely lays down the rule of amendment that every Court has power "to amend and control its processes and orders so as to make them conformable to law and justice, and to amend its own record so as to make them conform to the truth." Section 3449, speaking of the powers incident to all Courts to correct their own proceedings, says: "In allowing or refusing amendments, there is a wide discretion to be exercised by the Court, hence, no fixed rule can be laid down which would apply to each particular case that might arise; but as a general rule, the Court will amend the entries of its orders on the minutes or the records, and other proceedings, *nunc pro tunc*." These general principles are sustained by overwhelming authority; the only question of controversy in the case is as to the time within which such amendment will be allowed.

And first, as to the term, and second as to whether only before or after final judgment. During the term, the records are in the breast of the Court, and may be amended; but after the term, no amendment can be made, except by mere

l misprison, is a doctrine laid down by eminent judges. ithout going into the enumeration of cases, we may at this rigid rule of amendment has been relaxed, and d of cases are found where such amendments, after ent, have been allowed at subsequent terms of the

The doctrine laid down in 8 Wendell, 70, seems to onsonance with several recent decisions on this subject, : "The Court has power, at any time, to amend its s *nunc pro tunc*," etc. In Weed vs. Weed, 25 Connec- 337, it is laid down: "The Superior Courts have power ect a record of a judgment where such record does not m with the judgment delivered." In 3 California, 255: urt may, at any time, amend a judgment *nunc pro tunc;* is power is confined to cases where the record discloses ie entry on the minutes does not correctly give what the ent was," etc. In Parsons vs. McBride, 4 Jones' North na, 99, it was held: "Every Court has power to amend n records to make them conformable to the truth." In vs. Frink, it is decided: "A Court has authority to l its records so as to make them conform to the actual nd truth of the case." We need not go further to es- i the right of amendment, as by the authorities and the is of our own Code quoted, this matter is beyond ju- controversy.

ring established the principle, we might add that the tion of the minutes or records of the Court by the , when the proceedings are pending, is held to rest in ound discretion that appellate Courts will not, gener- interfere with that discretion, unless abused: Cullum lindriff, 20 Miss.; 5 Bennett, 522; Brown vs. La- 2 Paine, 66, 564; Pendleton vs. Pendleton, 2 Jones' , 135; Ingram vs. McMorris, 27 Ala., 142.

; the question may be noticed as to what evidence will l the discretion of the Court. In 14 Texas, 455, the seems to be, "If it should appear satisfactorily that an actually made had not been entered on the records as

of the term when it was made." In 3 Minnesota, 427, the rule laid down is: "Where the facts are undisputed, the Court has power to amend the record at a subsequent term." In 24 Texas, 660, the rule has this qualification: "A judgment cannot be amended *nunc pro tunc* at a subsequent term, without notice to the other party." In Frink vs. Frink, the rule is, as to amendments of records, that the Court may, in its discretion, receive and act upon any competent legal evidence: 43 New Hampshire, 508. In 44 New Hampshire, 525, it is held that "substantial reasons must be shown why it should be done." In 25 Connecticutt it is held that error in the "record is a question of fact, and that it has to be established like any other fact, by pertinent evidence, and that parol evidence is admissible in such inquiry."

In the case at bar, the facts stated were undisputed, and the question was one of power, and notice had been given; and, as we have just stated, the motion made at the term. In 25 California, 49 and 169, it is held that "the Court has not the power, unless some motion was made or proceedings instituted at the term, and unless the record discloses that the order as entered was not the order made." And we may remark, that this case did not altogether stand upon the testimony of the Judge. His evidence referred to the fact, and he was a competent witness upon the authorities, although, in Boon vs. Boon, 8 S. & M., 318, the memoranda or memory of the Judge is, of itself, held to be insufficient to amend the record at a subsequent term of the Court. But here, the fact that, at the time the non-suit was awarded, the Judge stated his reasons therefor, and gave leave to move to reinstate, so as to have the legal question argued, was not disputed, but admitted; and we are, therefore, of opinion that the Court below allowed such amendment properly under the rules of the law.

3. The other questions raised we will now briefly advert to. After the motion came up on the amendment, counsel proposed to go into the evidence on the trial, which, on motion,

e Court rejected, and only read such part of the written idence in Court, by interrogatories, as would enable him to derstand the legal question raised, and refused to adjudge y but such legal question. In this we do not think the urt committed error. It was competent for him to look to the interrogatories to ascertain the question made, although from the judgment pronounced by him, such evidence d nothing to do with the opinion of the Court, his decision ing that the notice provided for in the special Acts did not prive the movant of his rights to proceed against the dedant at common law.

In this view of the law we concur. The Superior Courts this State have original and general jurisdiction; and the ecial remedy given by the Code in cases of stock killed on ilroads is merely cumulative. And with this view of the w, we affirm the judgment of the Court below reinstating is case.

WALLACE, Superintendent Western & Atlantic Railroad, plaintiff in error, *vs.* JOHN W. CLAYTON, defendant in error.

(LOCHRANE, C. J., having been of counsel in this cause did not preside.)

An unusual and extraordinary flood in a river is such an act of God as excuses a common-carrier from his liability, at all events, for goods he has undertaken to transport; but even in such a case, the carrier is bound to exercise the care of a very prudent man to preserve the freight entrusted to him for carriage.

Diligence, and the want of it, are questions of fact, to be determined by the jury, under the evidence and the charge of the Court, and a new trial ought not to be granted by the Circuit Judge, unless the jury find strongly and decidedly against the weight of testimony.

In this case, the verdict is not strongly and decidedly against the weight of testimony, and as the case was fairly submitted to the jury, under the charge of Court, it was error in the Judge to grant a new trial.

Common-Carriers. *Actus Dei.* New Trial. Before Hon. JOHN COLLIER, Judge, *pro hac vice.* Fulton Superior Court. November Term, 1870.

Certain goods of Clayton were lost while in charge of the Western & Atlantic Railroad, as common-carrier. The defense was, that they were destroyed by a flood. That there was an unprecedented flood, and that the goods were destroyed by it, were shown. But plaintiff introduced evidence to show that, notwithstanding the flood, the goods could have been saved if defendant's agents had taken them on to a connecting road whose road-bed was higher than defendant's, and which, as prudent men, they should have done. Much evidence, *pro* and *con*, was introduced on this point. The evidence concluded, the Court charged the jury as follows:

"In order to entitle the plaintiff to a verdict in this case, the evidence must show that the defendant received the plaintiff's goods to be shipped over their road—the loss of the goods and their value at the place of delivery. If the testimony establish these facts, then the defendant is liable. In case of loss, the presumption of law is against the defendant, and no excuse will avail him, unless it was occasioned by the act of God or the public enemies of the State.

"The defendant is a common-carrier, and as such, is bound to extraordinary diligence. What is extraordinary diligence is defined by the Code, as follows: (Here the Court read the 2036th section of the Revised Code.) Does the evidence show in this case that the defendant took that extreme care of the plaintiff's goods, which every prudent and thoughtful person uses in securing and preserving their own goods? Could the goods of the plaintiffs have been saved by the exercise of extraordinary diligence on the part of the defendants? If they could and were lost, then the defendants are liable. If not, they are not liable.

"In determining the degree of diligence exercised by the defendants, you are authorized to take into consideration the facts testified to upon the subject of previous high water mark, the elevation of the road-bed or track, depot yard, the rapid rise of the water, as well as the efforts made by the defendants, and the time when such efforts were made to save plaintiff's goods.

"If, from all the facts and circumstances proven in the case, you shall believe that the defendants did take that extreme care and caution, which very prudent and thonghtful persons use in securing and preserving their own property, then the defendants would not be liable. If not, then they are liable."

The jury found for the defendant.

Plaintiff's counsel moved for a new trial upon the following grounds: 1st. Because the verdict was contrary to the evidence, and to the principles of justice and equity. 2d. Because the verdict was decidedly and strongly against the weight of evidence. 3d. Because the Court erred in summing up the evidence to the jury, in the following language: "In determining the degree of diligence exercised by the defendant, you are authorized to take into consideration the facts testified to upon the subject of previous high-water marks, the elevation of the road-bed or track, and depot yard, and the rapid rise of the water, as well as the efforts made by defendant, and the time when such efforts were made to save plaintiffs' goods;" and in charging the jury a second time, at the request of defendant's counsel, after the charge had been concluded, that if plaintiffs' goods were destroyed by the act of God, defendant was not liable, and then, without request, repeating the language as above quoted, by way of summing up the evidence again, and thus diverting the attention of the jury from all that portion of the testimony which plaintiff relied on to show a want of extraordinary vigilance on the part of defendant.

The motion for a new trial was, by order granted in term time, set down for argument at Chambers, and argument was accordingly had at Chambers, on the 5th day of September, 1870, before the Honorable John Collier, the presiding attorney selected by the parties, and the said presiding attorney passed an order granting a new trial.

The Court granted a new trial and that is assigned as error.

P. L. MYNATT, L. E. BLECKLEY, for plaintiff in error. What is act of God: 6th John R., 160; 23d Wend. R., 306; 14th, 215; 1 Sm. L. Cas., 272, *et seq.* When *actus Dei* shown, *onus* changed: 1 Sm. L. Cas., 273, 274, and authorities cited. Interference with verdicts: 37th Ga. R., 607; 36th, 418; 31st, 365; 30th, 212.

J. D. POPE, R. H. CLARK, for defendant. Grant of new trial: 26th Ga. R., 164; 6th, 185; 35th, 272; 36th, 604; 37th, 557; 3 Kelley, 310; 2d, 173; 9th Ga. R., 9–19; 16th, 27; 26th, 164; 30th, 968; 32d, 472; 34th, 375; Revised Code, sections 2036, 2040; 2 Bailey, 157; 1 Harp. L. R., 262, 468; 1 Conn., 491; 38th, 129; 39th, 118; 24th, 412; 26th, 528; 28th, 491, 589; 14th, 36; 17th, 498; 19th, 335; 30th, 133, 241, 476; 25th, 184. Charge of Court: 7th Ga. R., 428; 16th, 38, 48; 17th, 448; 18th, 697; 30th, 361, 133, 245, 380; 39th, 603. Important points in doubt: 36th, 321; 37th, 694. Negligence of agent contributing to loss caused by act of God: 2 Bailey, 157; 1 Harp. L. R., 468; 1 Sm. L. C., 271–2–3; 30th N. Y. R., 564, 630.

McCAY, J.

It cannot for a moment be denied that a flood, such as the evidence in this case discloses, is an act of God, in the sense of the books, which make such an act an exception to the influences against which a common-carrier insures. Indeed, the irresistible march of a mighty and unexpected flood is,

of all others, the most terrible exhibition of the powers of nature and the helplessness of man. It is only the Ruler of the universe who can say, with authority, to the rushing tide, "thus far shalt thou go and no farther." When such an event occurs, that rule which makes a common-carrier liable at all events, gives way: Angel on Carriers, 153, 160.

But it does not, therefore, follow, that the carrier may fold his hands, or that he is to be excused if he is negligent, or fails in exercising the diligence of a very prudent man. That duty is always upon him. Even amid the fury of the storm or the rush of the flood, he must use that prudence, discretion and energy which experience teaches very prudent men to use under such circumstances. If the loss be by reason of the want of extraordinary diligence in the carrier, then, though the agent of the loss be flood or storm, the carrier is liable: Angel on Carriers, 153, 160.

The real question in this case is, whether the railroad officials exercised, under the circumstances, the diligence of a very prudent man. This was a question of fact for the jury. From the nature of the case, this must always be so. The law can only lay down general rules, and on questions of diligence, it does this by referring to the conduct of men in the management of their affairs. Ordinary diligence, is the care which every prudent man takes of his own property of a similar nature. Extraordinary diligence, is that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property: Revised Code, sections 2035 and 2036. What a prudent man will do, and what a very prudent and thoughtful man will do, under special circumstances, is, by the very definition, left to the judgment of the tribunal which has the facts of the case before it. Under our system, this is the jury—twelve men, observers of their fellow-men—with that education in the arts of care and diligence, and in the effects of flood and storm, which nothing but experience can give. The very definition of the Code makes human experience the standard, and what

this experience is, and how the evidence classes the acts of the parties, under the circumstances of the particular case, it is for the jury to say: Angel on Carriers, 7, 11, 22, 84.

Under our law, within certain limits, the finding of the jury is conclusive. Unless the verdict be strongly and decidedly against the weight of evidence, the Judge cannot disturb it: Revised Code, sections 2896, 3662. We do not think this verdict is strongly and decidedly against the weight of evidence. The proof is conclusive that this overflow was a very extraordinary one. Nothing like it had ever been known. The depot yard is twelve feet above the highest rise previously known of the Tennessee, and the flood was from eight to twelve feet deep over the yard. So, that the water rose from twenty to twenty-four feet, perpendicular, higher than ever before known.

We do not think the railroad company was wanting in the prudence of a very prudent and thoughtful man, in not raising its yard more than twelve feet above the highest flood ever before known in the river. Such a rule would make railroads almost impracticable, and would be contrary to public policy. It was not the fault of the company that the freight of the plaintiff was not sent off, in the ordinary course. Even that was prevented by the flood, and the cars were compelled to return to the yard.

It is, in fact, very plain, from all the evidence, that there was but one mode in which the freight could have been saved. It might have been run off upon the track of the East Tennessee & Georgia Railroad, on the 7th, 8th, or 9th of March, and saved, and the hinge of the whole case is just here. Were the agents of the company guilty of the want of that diligence which the law casts upon them, under the circumstances as disclosed by the evidence? We think not. There was not a moment, after the flood got beyond the highest ever known before, when they did not have a right to suppose that the limit of the overflow would soon be reached, and the higher it rose the more unnatural it became; the

ore contrary to human experience, the more baffling to the udence of the prudent. If we add to this that on the 8th ey had a telegram from Knoxville that the river was fall-g, it is not at all strange they should feel quite sure they re safe at their own depot. But, it is said, it was but a small tter to run the trains upon the East Tennessee & Georgia ilroad track, and that the Superintendent testifies, that if y had asked him, he would have granted leave. He does t say he would have granted leave on any particular day, t, generally, that he would have granted the leave. On the rning of the 9th, all was yet safe, and had the cars been ved on that day, they would have been saved. Mr. Hook vised their removal, and during the day, Mr. Jackson went the office of the Superintendent of the East Tennessee & orgia Railroad to see if he could get the leave. The Super-tendent was gone up his own road, and Mr. Jackson learned *the yard* that he could not use the track, because to do so uld cut off the East Tennessee & Georgia Railroad trains m its own yard and depot. It does not appear at what ne the Agent of the East Tennessee & Georgia Railroad urned; but, in fact, the Agent of the Western & Atlantic ilroad undertook, after dark, on the night of the 9th, to ve the cars to the dry place on the other road, *without* per-ssion. After moving the larger portion, a car got off the ck, and owing to the depth of the water, could not be got ck. It resulted that some twenty-five cars were left at the d, and the freight in them was ruined by the still rising ter. In these cars was the plaintiff's freight.

It is contended that it was a want of proper prudence not have moved, even *without permission*. We do not think

It is a serious matter to occupy a railroad track. It is evidence that the East Tennessee trains continued to run til the 10th. It did not move its cars upon the dry ground the 10th, and on the 9th the Superintendent was up the d with an engine. It would have been very rash to oc-py the track, the only track connecting the East Tennessee

& Georgia Railroad with its depot and yard, without permission; serious damage might have occurred, and Mr. Jackson could not know but that this very spot would be wanted by the other road for its own purposes. We must keep in mind, too, all the time, that, according to all reasonable expectations—all human experience—it was expected that each rising inch of the river would be the last. But it is said there was unusual and criminal neglect in the slowness and bad management of the agents in the actual move; that they did not do even this as prudent men. We are free to say we do not know. We do not feel ourselves competent to judge. We have observed that there is much intricacy in what is called *ginning cars*, and we can easily understand how, under the circumstances, with but one track on the East Tennessee & Georgia Railroad, there should be delay, and that it might be very difficult to get clear of the unfortunate flat car, which finally run off the track.

All this, as we have said, was for the consideration of the jury. It was all before them, the flood and its character, the habits of men and their conduct, under such circumstances; and the jury has decided that the railroad officials were not wanting in extraordinary diligence. We think their verdict is *not* strongly and decidedly against the weight of testimony. Indeed, we incline to think the weight of testimony is with the verdict. It is very easy, after the event, to see how all might have been saved; but the jury had a right to consider the matter as though they were present, without a knowledge of the final catastrophe, and to ask themselves what was prudence, under the circumstances, as they, in fact, existed, at each moment, as events transpired.

On the whole, we think a new trial ought not to have been granted. If such a verdict as this, under such evidence as this, can be set aside, the right of the jury to judge of facts is gone.

A. M. PARKER, plaintiff in error, *vs.* THE FULTON LOAN AND BUILDING ASSOCIATION, defendant in error.

1. Where an action was brought by a stockholder in a Building and Loan Association to recover back usury paid, in a settlement with them of the notes and mortgages executed for the sums of money he had received, and the plaintiff, being put upon the stand testified, among other things, that in such settlement, he had paid over $3,000 00 more than principal borrowed and legal interest and that the bill of particulars attached to his declaration was correct, and showed *prima facie* evidence of such fact, and there was no proof of the constitution and by-laws of such Association before the Court, and the Court granted a non-suit, and overruled the motion of plaintiff to open such case, and offer additional testimony:

Held, first, That usury voluntarily paid may be recovered back, under the laws of this State; Code, section 2025, declares the contract as to usury void, and is in affirmance of the principles of the common law, as has been settled by this Court, and is sustained by a long series of decisions, sanctioned by the highest and most eminent judicial authority:

2. *Held again*, Under the facts in this case, there was sufficient testimony to have caused the case to be submitted to the jury, and the settlement relied on, under the principle of accord and satisfaction, was not conclusive of the rights of the plaintiff, but constituted a defense which ought to have been submitted to the jury:

3. *Held again*, That the fact of plaintiff being a shareholder in such Association did not warrant the conclusive presumption against him, that there was no usury in its transaction; this may or may not appear from its constitution and by-laws, and the nature of its operations in loaning money, but without such proof it did not appear from the facts before the Court:

4. *Held again*, The motion to add additional testimony ought to have been allowed, under the rule laid down in *McColgan vs. McCay*, decided by this Court.

Non-suit. Usury. Accord and Satisfaction. Before Judge HOPKINS. Fulton Superior Court. November, 1870.

This cause is reported in the opinion.

ARNOLD & BROYLES, for plaintiff in error. What is usury: 21st Ga. R., 620; 11th N. Y. R., 368; 2 Cow. R., 705; 2 Parsons on C., 394; Chitty on Con., 704, and (*n;*) 7 Peters'

R., 109; Story on C., sec. 597. It may be recovered back, after voluntary payment: 1st Kelly, 140, 154, 155, 242; 6th Ga. R., 228; 10th 389; 2d Wend. R., 481; 7 Cow. R., 662. Court should have allowed other evidence: 25th Ga. R., 631.

HILLYER & BROTHER; A. W. HAMMOND & SON, for defendant. Usury purged by contract: Blydenburg on N., 33; 2d Stewart's R., 63; 1st Kelly, 403; 6th Ga. R., 253. Accord and satisfaction: R. Code, sec. 2827 *et seq.;* 21st Ga. R., 592; Mistake not caused by other party no cause of relief: R. Code, secs. 2594, 3055.

LOCHRANE, C. J.

This case was an action brought to recover back money paid as usury. The declaration sets forth that the defendant is indebted to the plaintiff, in the sum of $4,605 75, and is brought in the usual form of actions for money had and received, the items making up the usurious interest being attached as a bill of particulars. The defendant pleaded the general issue, and the case came on for trial. During the progress of the case in the Court below, the defendant also pleaded accord and satisfaction. The plaintiff was put up as a witness, and testified that the bill of particulars was correct, and that he had paid the defendant the items in said bill of particulars in payment of, and for the use and loan of the sums of money stated in said bill of particulars. He also testified, that he had paid $6,500 00, in city property, belonging to him, to the defendants, and upon which they held certain mortgages. The city property in the trade, was valued at $6,500 00, and he received $740 00, the amount the property in value exceeded the claims of the defendant. On cross-examination, he stated that he was a member of the Fulton Loan and Building Association, and that he had owned a hundred shares of its stock, and had borrowed on such shares, as a member of the Associatoin, in the usual mode in which such association lets out such funds to its members, and upon

the terms prescribed in its constitution and by-laws. At each time a mortgage and note were executed for the security of the money borrowed; that the first sum he obtained from the Association, was at eighty-one per cent premium; that on the 8th of March, 1868, he had a settlement of the claims held against him, on account of the moneys he received or borrowed; that nothing was said about usury in the settlement; and in pursuance of such settlement, he conveyed the property, which was of the value of $6,500 00.

Plaintiff closed, and defendant moved for a non-suit, which the Court granted; when plaintiff moved the Court to proceed to introduce further evidence, which motion was objected to and sustained by the Court, and the non-suit was entered. The case comes before this Court from the exception filed to the judgment of the Court below, and the main and controlling question of this case, is whether there was sufficient *prima facie* evidence to have invoked, in this case, a submission to the jury.

This Court has held, that slight evidence will be sufficient to cause the case to be submitted to the jury for their decision; and the authority of this Court, by repeated decisions, sustains this proposition. Was there testimony in this case sufficient to have it submitted to the jury? It is argued that the settlement in this case operated as an accord and satisfaction, and, as it appeared from the testimony of the plaintiff himself, that it was conclusive, and barred the right of plaintiff to recover; that, conceding usury to have existed in the original contract, it was purged by the agreement and settlement of the parties, and was the compromise of a doubtful right disclosed by the testimony; in the fact that he was a shareholder in said Association, and, under the rule laid down in 21 *Georgia*, 592, relative to such Asociation, and money borrowed by shareholders therein. It was also argued before us that usury paid on a contract extinguished, cannot now be recovered back in Georgia, there being nothing illegal or penal in it. We have examined these various questions

with careful consideration, and will now proceed to deliver the judgment of the Court thereon.

1. And first as to whether usury voluntarily paid can be recovered back, under section 2025 of the Code. We do not deem it necessary to go into the history of usury, as this question has been the subject matter of much learned disquisition, and has attracted the attention of statesmen and legislators for nearly a century. This Court, in 1st Kelly, laid down the rule, that usury paid could be recovered back. In *Whitehead vs. Peck*, Judge LUMPKIN, in construing the Act of 1822, which declared that usurious contracts should not be void, seriously doubted whether usury voluntarily paid, could be recovered of or by anybody. Our Code declares the effect of usury is to annul and make void the contract for the usury. It does not provide for any remedy by suit, but leaves the question upon the principles settled by a long series of decisions, and sanctioned by the highest and most eminent judicial authority.

We are not unaware of the fact that cases may be cited under somewhat similarity of statutes, where a different construction has been ably maintained, as in 21 Texas, 441; 16 La., A. N., 217; 28 Ill., 519; 29 Ill., 184; 9 Iowa, 376; 12 Iowa, 300. The principle held is, substantially, that the statute gives a defense but not a right of action; that the plea of usury is a privilege the party could avail himself of, and his failing to do so deprived him of any remedy to recover back the usury paid.

But these innovations upon the common law are weighed down by an almost overwhelming mass of authority, and the opinion of Lord Ellenborough in ..... *vs.* ....., and the reasons he gave for the contrary doctrine have been sanctioned, if not with unanimity, with almost universal approval. In Vermont, Maine, Pennsylvania, New York, Tennessee, Indiana, Kentucky and Wisconsin, we have examined cases which support the rule laid down by this Court, in 1st Kelly, and subsequently sustained by this Court in 36 *Geor-*

gia Reports, 509. And upon a fair construction of the section of the Code alluded to, with a full consideration of its history and the principles of law it was intended to enunciate, we are satisfied that it is but an affirmance of the principles of the common law, and concur in the decisions of this Court in the premises.

2. With the assertion, then, of this principle that usury paid may be recovered back, was there sufficient in the proof in this case to constitute slight evidence of usury in the transaction to which it referred? If there is, then we are not satisfied but what the Court below ought to have submitted to the jury the question in this case. The settlement, as proven, was not in itself sufficient to have taken the case from the consideration of the jury. It was not such conclusive evidence as barred the plaintiff's rights, but constituted such a defense to the recovery sought, as ought to have been submitted to the consideration of the jury upon the charge of the Court under the rules of law. The fact that property was paid in such settlement, under the proof in this case, became *prima facie* the equivalent of money. And the action for money had and received, could be maintained thereon. And that the excess was paid back to the plaintiff, would not change the general principle. The proof in this case, in the opinion of this Court, was sufficient to have carried it to the jury upon the whole evidence to have been considered by them. The loan and excess of interest over legal rates paid, made a case which required evidence of the nature and character of the loan.

3. The mere statement that he belonged to the Association did not authorize the conclusive presumption that there was no usury in its transaction. This fact may or may not appear from its constitution and by-laws, and the nature of its operations; but without such proof it is impossible for the Court to arrive at any satisfactory conclusion, under the facts of the case. From the evidence, for the use of the principal within one year, there appears to have been over $3,000 00

paid back more than principal and legal interest, and while this may be satisfactorily explained by proof, the Court cannot conjecture the mode or manner of arriving at it by the mere statement that he was a stockholder, and borrowed under the terms of its constitution and by-laws.

4. Again, in the opinion of this Court, the motion made to reopen the non-suit before it was entered, ought to have been allowed. In *McColgan vs. McCay*, it was held by this Court that it is almost a matter of course to let in new evidence on a point to save a non-suit. BENNING, delivering the opinion, states, the practice is commended by every consideration of expediency. And while the record does not disclose what additional proof was offered, that was a question subsequently to be determined. The motion was to open the case to introduce testimony. This ought to have been allowed, especially as it appears that the non-suit had not been entered on the minutes. And for these reasons we reverse the judgment of the Court below.

THOMAS L. LACKEY, plaintiff in error *vs.* THE GEORGIA HOME INSURANCE COMPANY, defendant in error.

Under section 2770 of the Revised Code of this State, "a second insurance on the same property, without the consent of the insurer voids his policy." And this is true even though the second insurance, valid upon its face, is voidable by the second company on the ground of the failure of the insured to give it notice, at the time the policy was procured, of a prior insurance of the same property in another company.

Insurance. Before Hon. JOHN COLLIER, presiding by consent. Fulton Superior Court. December, 1870.

This was assumpsit by Lackey against said company, upon its policy of insurance for $850 00 on his two-story framed dwelling-house, and $150 00 on his one-story, framed store-

house, issued at Columbus, Georgia, on the 23d of August, 1867, and to run one year. One of the stipulations of this policy was: "This policy is made and accepted in reference to the conditions therein contained, which are to be used in order to explain the rights and obligations of the parties to this contract, in all cases not herein specially provided for." And one of the conditions therein specified, was: "And provided further, if the assured shall have already any other insurance against loss or damage by fire on the property hereby insured, or shall hereafter procure any further insurance thereon, without notice to and written consent of this company endorsed hereon, this policy shall then be null and void. And if any subsequent insurance shall be made upon the property herein named, which, with other sums insured, shall, in the opinion of this company, amount to an over-insurance, said company reserves the right to cancel this policy, by paying to the assured the unexpired premium *pro rata*."

The defense was, that, when this policy was issued, Lackey had other insurance on said property, and during its continuance took yet other insurance on said property, of which he gave defendant no notice. Lackey testified that the said property was his, was worth $2,700 00, the two-story house being worth $2,200 00 and the other $500 00; that they were destroyed by fire in October, 1867; that he made proof of loss and gave notice according to the requirements of the policy.

This policy and proof were read in evidence. The proof stated that when burnt, the property was insured also in the Security Insurance Company, of Louisville, Kentucky, to-wit: for $800 00 on said dwelling-house, from the 26th of September, 1867, for one year, and in the Ætna Insurance Company, for six months, from the 12th of February, 1867, for $200 00 on the dwelling and store, and $600 00 on his stock of groceries in said buildings. These two policies were also read in evidence. They contained like stipulations and conditions with that of defendant aforesaid. On

neither policy was there any memorandum of any insurance other than that expressed in *it*, and Lackey testified that he gave to neither notice of the prior or subsequent insurance. He denied stating, after the fire, to the agents of the two last named companies that he had no other insurance. He said he never had read either policy. Here plaintiff's cause was rested. A motion for non-suit because the defendant's policy was avoided by said prior and subsequent insurance was made, but the motion was overruled.

The agents of the defendant and said other companies each testified that they had no notice of said other policies. The agents of the Ætna and Security, both testified that Lackey told each of them, repeatedly, after the fire, that he had no insurance other than in their respective companies. And the agent of the Security testified that Lackey made out proof of his loss against the Security company, therein swore he had no insurance but theirs, but subsequently said he wished to show this proof to his brother, got it and never returned it, nor made any further claim on the Security company.

The Court charged the jury that "if plaintiff, since he procured the policy, sued on, from defendant, obtained other policies of insurance on the same property, and that without giving notice of the existence of such previous policy to such subsequent insurer, or of such subsequent insurance to such previous insurer, though that might void the last policy, yet it would not void the first policy," etc. The jury found for plaintiff.

Defendant moved for a new trial, upon the grounds that the verdict was contrary to law, etc., and that said charge was wrong. A new trial was granted on this last ground. That is assigned as error.

D. P. HILL; T. P. WESTMORELAND, for plaintiff in error. What is double-insurance: Phil. on Ins., secs. 359, 367, 368; 5th Hill's R., 298; 49th Penn. R., 14. Policy good as to part where parts are separable: 17th Mo. R., 258. If

second policy is void, first is valid: 23d Pick R., 418; 4 Allen (Mass.) R., 217; 6 Cush., (Mass.) 342; 2 Watts & S. (Penn.) R., 506; 37th Maine R., 137; 5th Ohio R., 466; Parsons on C., 458; 4 Zabriskie, 448; R. Code, secs. 2761, 2770; 6 Wend. R., 488.

L. J. GLENN & SON, for defendant. Defendant's policy void for want of notice: 16 Peters' U. S. R., 496; 4 Howard's U. S. R., 220; 20 Barb. (N. Y.) R., 635; 22 N. Y. R., 402; 5th Ohio R., 467; David vs. Hartford Ins. Co., Supreme Court of Iowa, April, 1862; R. Code, sec. 2770; 40th Ga. R., 135. This policy is entire, and being second, without notice of other, is void: 10 Cush. (Mass.) R., 587; 3 Gray (Mass.) R., 583; 8th, 33; 25th Barb. (N. Y.) R., 497; 45th Maine R., 472; 47th, 403; 51st, 110. Improper charge: 30th Ga. R., 133. Construction of contracts: R. Code, sec. 276. Amount of recovery: R. Code, sec. 2772.

McCAY, J.

Without doubt, there is an irreconcilable conflict in the authorities upon this question. Upon one side, are the Supreme Courts of Massachusetts and Pennsylvania: 23 Pick R., 418; 4 Allen Mass. R., 217; 6 Cushing R., 342; 2 Watts and Serg't R., 506; 37 Maine R., 137. On the other side, the Supreme Court of the United States, and the Supreme Court of New York; 16th Peters' R., 496; 4 Howard R., 220; 20 Barbour R., 635; 22 N. Y. R., 402; 5 Ohio R., 467. The former Courts hold that the second policy does not void the first, unless the second be a valid one—one that can be recovered upon—and that, if the second company's policy can be shown to be void, even in consequence of the fraudulent representations of the insured, the condition of the first policy is not broken, because there is, in fact, no second insurance. The other cases hold, that if the second policy is *apparently* good, good upon its face, if to void it, proof must be introduced, especially if that proof be the

fraud of the insured, then the condition of the first policy is broken.

A good deal may be said in favor of both of these views. Supposing that the object of the condition is merely to provide that the taking of the second policy shall be considered an abandonment of the first, it may not be fair to hold that the insured has given up his grasp upon the first until he has clearly a *hold* upon the second. Again, it may be said that here is a condition imposed by the company, on its own policy, over its own signature, and it is to be construed most strongly against it; and, as it is literally true that there is no second policy, the words of the condition are not broken.

In favor of the view taken in New York, and by the Supreme Court of the United States, it may be said that it is a violation of all principle to permit one to set up his own fraud; that it is beneath the dignity of a Court of justice to sit by and aid one to impose an obligation upon another, by showing that he, the plaintiff, has been guilty of a falsehood. We do not think it necessary to undertake to show, upon principle, which of these eminent tribunals is right. The decisions in all these cases turned upon the *contract*, upon its terms, and upon its meaning. The question here turns, not so much upon the contract as upon our statute. Our Code, section 2770, enacts as follows: "A second insurance, unless by consent of the insurer, voids his policy." Any contract made here, is made under this statute, no matter where the company resides. And this law would make void the first policy, though nothing was said in it about a second policy. The case in Georgia, therefore, turns rather on the law than on the contract.

The law is founded in public policy; it is intended to protect, not only insurance companies, but the public against the evils of double insurance. It is found that to permit double insurances, is to afford a temptation to self-incendiaries, who are a danger in the community. The man who, to get the benefit of an insurance, sets fire to his own property, endan-

gers the property of his neighbor. The object of the law is to prevent double insurance; to stop, if possible, the existence of property-holders, with over-insurance upon their property.

Now, it is just as entirely within this public policy to have a second insurance, which one *thinks* is good as to have one which is really good. The danger of a burning is the same in both cases—nay, the very fact that one has fraudulently procured an over-insurance is, *prima facie*, a suspicious circumstance. The public evil, which the law intended to prevent, is just the same, perhaps greater, if the second insurance be a fraudulent one.

Technically, it may be true that there is no second insurance; but to give this construction to the statute, would, as it seems to us, be indeed sticking in the bark. Such is not the usual mode of construing even criminal statutes. Our law against bigamy provides a punishment for one who *marries* having at the time another wife living. But, says this mode of reasoning, the second marriage is void, one cannot *marry* with a wife living. So, too, we make it penal to alter a promissory note; yet, in fact, the alteration is void, and if *detected* can hurt no one.

Laws are not to be so construed. We must look to the manifest intent of the law, and take care not to give it such a construction as will make the intent fail. The manifest intent in this law is to prevent the existence of persons in the community who have an *inducement* to set their houses on fire. To say that this law does not apply to the case of a man, who, in fact, has this inducement, but who, if his fraud is discovered, cannot get the benefit of it, is, as it seems to us, making the law of very little effect. We can easily see how this insurer might get the benefit of both policies. His failure turns only on his being *found out*. Perhaps, even now, this second company does not know of the existence of the first policy, and if the plaintiff recovers from the Home, he may yet sue the other. In a suit against them he would

not be bound by anything he now sets up. Perhaps he can, notwithstanding his present plea, show that he *did* give the second company notice. Are they parties here? Do they know all he now admits?

We are clear that the taking out the second policy without the consent of the first company "voids the policy," and that the other fact, to-wit: that this second policy, as appears from the proof, is capable of being resisted and treated as null by the company that issued it, in consequence of the misrepresentations of the insured, does not help the case.

Judgment affirmed.

C. WALLACE, Superintendent Western & Atlantic Railroad, plaintiff in error, *vs.* TUMLIN & STEGALL, defendants in error.

1. Where a suit was pending in a Court of this State against the Superintendent of the Western & Atlantic Railroad, upon the Act of 24th of October, 1870, to authorize the lease of said road, and before said lease was consummated:

Held, Under the 8th section of such Act, which provides for the settlement of the liabilities of said road by a Board of Commissioners therein named, *or until* the claim has been verified by a judgment of the Court having jurisdiction of the case, that the Court having jurisdiction of the case may proceed, under such jurisdiction, to a hearing, and by an appeal to this Court, under the rules of law.

2. Where a suit was instituted against the Western & Atlantic Railroad for damages, growing out of a breach of contract, and the declaration alleged that the contract was in writing and had been lost:

Held, first, The remedy, under the Code, section 3910, is cumulative, and does not deprive a party of his right to sue at law.

3. Where proof of a loss of an original paper is made before the Court, and he admits secondary proof thereof:

Held, Under sections 3714 and 3779 of the Code, questions of diligence in exhausting the means of information for primary evidence, accessible to the party, is one addressed to the sound discretion of the Court below, with which this Court will not interfere, except where it has been flagrantly abused.

Wallace *vs.* Tumlin & Stegall.

Where the evidence upon the breach of contract exhibits the fact that he plaintiff was to receive a certain price, and the amount necessary or the performance, after such alleged breach, is a matter of fixed omputation, and the Court charged the jury on the measure of damges that plaintiff was entitled to recover the whole amount sued for, ess what would have been his expenses in performing the contract:
ld, That the actual damages which the plaintiff was entitled to reover, embraces the difference between the cost of doing the work and he price to be paid for it. The law requires the utmost good faith in elation to contracts, and where parties refuse to carry out contracts nto which they have entered, the party injured may pursue his remedy or damages, and the measure of the damages for such breach or reusal to carry out the contract will be computed by ascertaining the rofits of the enterprise, after deducting the legitimate and actual costs f its execution; and, in the view we entertain of the law of this case, he charge of the Court below was error.
When a motion is made for a new trial, on the grounds of newly disovered evidence, in the discovery of a letter, testified to as the conract of the parties, and such letter referred to matters of defense roven on the trial:
ld first, That applications for new trial on this ground, and the uestion of diligence and materiality, and whether it is cumulative nly or goes to the impeachment of a witness, and whether it would ave changed the result, will be closely, if not critically, scanned by he Court:
ld again, Where the newly discovered evidence is reconcilable with he other proof in the case, or if there appears, on the whole, sufficient evidence to support the verdict, the Court will not grant a new rial, especially where the Court below has violated no rule of law in ubmitting the case to the jury, and there is sufficient evidence to suport it, and he has refused a new trial.
Judgment affirmed, with instructions to deduct from the amount o f he verdict $2 00 per month, with the interest thereon for three years.

Effect of Repeal. Western & Atlantic Railroad. Secondry Evidence. Measure of Damages. Profits. New Trial. umulative Evidence. Before Judge HOPKINS. Fulton perior Court. November Term, 1870.

In August, 1867, Tumlin & Stegall averred that, on the t of December, 1857, Spullock, then Superintendent of the estern & Atlantic Railroad, in his official capacity as such, ployed them to supply with water a tank, at Shanghai

station, on said road, for five years from the completion of the necessary works therefor, to-wit: An hydraulic ram, pipes and fixtures, all to be furnished by plaintiffs, for which Spullock, as Superintendent, agreed to pay them $1 00 per day, payments to be made per month; that they erected said works at a cost of $700 00, which were sufficient to perform the service for five years, and on the 1st of March, 1858, began to supply water, and continued so to do till March, 1860, when defendant discontinued the use of said tank and tore it down. Because they were ready to go on and were prohibited by defendant, they claimed pay, at said rate, for the whole time. They averred that this contract was in writing, but had been lost, that the defendant refused to pay on demand, etc. The defendant pleaded the general issue and Statute of Limitations, four years. The defendant's counsel moved to dismiss the suit, because it was based upon a lost instrument, which had not been established according to the statute for such cases provided. This motion was overruled.

Plaintiffs introduced evidence as follows:

LEWIS TUMLIN, one of the plaintiffs, testified as follows: In 1857 or 1858, Tumlin & Stegall, through me, made a contract with James M. Spullock, then the Superintendent of the Western & Atlantic Railroad. Said contract was reduced to writing, and signed. I had the writing in my possession, and afterwards (perhaps about 1861)—but I do not remember the year exactly—handed it to Hawkins F. Price, one of the members of a legislative committee appointed to investigate the affairs of the Western & Atlantic Railroad. He received it as a member of the committee, and not as a private individual. A copy of said contract was subsequently included in the printed report of said committee. The original is not now in my possession, and I know not where it is. I believe it to be lost. Have never seen it since I handed it to Price. I have inquired of Price for it several times, and he answered that he did not have it, and did not know what had become of it. Have not inquired of any other

member of the committee, nor at any office in the State-House, nor had any search made among the papers of the Legislature. Have mentioned it to Campbell Wallace while he was Superintendent, who could neither find the original nor one of the reports containing a copy. He said he would get a copy of the report, if possible, but stated afterwards that none could be found, or that he had failed to find any. My impression is that Price was the person to whom I gave the writing—that is my best recollection. He was from my own county, (Bartow) and was on the committee. The contract, as agreed on and set out in the writing, was this: Tumlin & Stegall were to lay down pipes, etc., and keep up a running stream of water at Shanghai Station on the Railroad for the term of five years, for which the road was to pay them one dollar a day for the whole term, Sundays included, the days of each month to be paid for at the end of each month.

The plaintiffs went on to perform their part of the contract. They bought a piece of land with a good spring upon it, and by means of pipes carried the water from said spring to the station, about a hundred and fifty yards, and kept up a running stream for something like two years. The stream was still running when the tank was pulled down by the authorities of the road, and the plaintiffs were ready and willing to have kept it running from that time to the end of the five years. The works as then existing were apparently sufficient, without other expense than the wages paid Mrs. Reeves for attending to them, to supply the stream for the whole term. The plaintiffs paid Mrs. Reeves about two dollars per month. Her business was to see that no trash washed into the pipes, and that the stream was kept running. She was employed and attended to the business as long as the tank stood and the road would use the water. The plaintiffs gave no consent to the act of the road in taking down the tank and ceasing to receive water.

The land purchased was either ten or forty acres, I do not

remember which, and was of value only for the spring and for this purpose. It was not wanted by the plaintiffs for any other purpose, and would not have been bought by them if this contract for supplying water had not been made. It is still their property, but they have no use for it. My recollection is that it cost $100 00 or $200 00, but Stegall thinks it cost $250 00, and perhaps he is more likely to be correct, as he gave more attention to executing the contract than I did. Indeed, the whole matter of erecting the necessary works was under his charge, and I do not recollect that I was ever at the spring after the work was finished. I do not know whether any rams for elevating the water were put up there or not. The whole expense to the plaintiffs of starting the water to run, according to contract, including cost of the land, was $600 00 or $700 00. So I think, from my best recollection, and in view of this expense, I thought the contract rather a hard one. The pipes were of cast iron, and are all there yet, as they were placed in the ground when the work was first done.

I have never received one cent under said contract. Money to pay us was sent up the road several times, as I understand, but only at the rate of $20 00 a month. I would not receive it, because not enough, according to contract, and I gave strict orders to Stegall not to receive it. Whilst Dr. Lewis was Superintendent of the road, I conversed with him several times in regard to paying us. He refused to pay more than $20 00 per month, saying that Spullock had agreed to pay too much. He admitted that the water ran in a beautiful stream. The written contract was then in my possession, but I did not show it to him, so far as I now recollect.

This evidence of the contents of the writing came in over objection of defendant's counsel, upon the ground that the loss of the original was not sufficiently shown.

Stegall testified the same, in substance, as to performance, and that nothing was paid to him. Spullock testified to the

contract substantially as Tumlin did. Mr. and Mrs. Reeves testified to keeping up the supply of water as averred, so long as defendants would receive it. Demand and refusal of settlement before suit being shown, plaintiffs closed.

Defendant's counsel read the interrogatories of Dooly, Supervisor of the road, to show that such contract was not made, and that plaintiff had been paid something for such work, and closed. The Court then charged the jury, among other things not excepted to, as follows:

"In this case the plaintiffs do not seek to recover damages for any breach of the contract, except the alleged breach by non-payment of the whole sum sued for, and no other breach can be recovered for.

"They can, however, recover the whole amount sued for, less what would have been their expenses in keeping the water running from the time the road ceased to use it until the end of the term contracted for, and less, also, the payments made to them, if any, provided they have proved the contract as alleged, and the facts of the case are, substantially, as set out in the declaration. The parties, as witnesses, are entitled to full credit, as other witnesses, unless they have been impeached or discredited."

The jury found for plaintiffs for $1,825 00, principal and $1,046 35 interest, up to 25th November, 1869.

Defendant's counsel moved for a new trial, upon the grounds, that the Court erred in refusing to dismiss said cause; in allowing the contents of said writing proved, and in each clause of said charge; and because the verdict was contrary to law, etc., and for certain newly discovered evidence. That evidence was produced with an affidavit, as follows:

"I, P. L. MYNATT, attorney for the defendant, do swear, that since the trial of the case, I have discovered a report of a Senate committee of the State of Georgia, of which Hawkins F. Price seems to have been a member, in the year 1858; that it is the only Senate committee I have been able

to hear of, after diligent search and inquiry, of which Hawkins F. Price was a member; that in the proceedings of said committee, I find, on pages 35, 36, 37, 38 and 39 of the pamphlet, which I ask to be considered in connection with this affidavit, a report or review of the dealings of the plaintiffs with Spullock, formerly Superintendent of the road, and, among the rest, what purports to be a copy of a contract between the plaintiffs and Superintendent Spullock, reduced to writing after Spullock left the road. Said contract is in the form of a letter from Spullock to Tumlin, of date, 28th February, 1858. It seems to be treated as the contract by the committee, and affiant supposes it to be the contract alluded to by the witness, Tumlin, as he sees no other in said report. From this writing it seems that Tumlin was to keep up a supply of wood and water at a station between Allatoona and Etowah River, for a term of five years, at customary prices. Affiant had no knowledge of the existence of this report, or of the evidence contained therein, until after the trial, and he thinks it was not known to any officer or agent of the road, as this matter has been under his control and management, and he had made diligent inquiry for anything of the sort; he thinks this evidence would produce a different result, if a new trial were granted."

The printed report tended to throw light upon the following letter, but none of *it* is necessary for our purposes. The discovered letter, as printed in that report, was as follows:

"ROME, February 28, 1858.

"*Colonel Lewis Tumlin:*

"DEAR SIR: Your letter, bearing date 13th instant, has been received. You request me to state what the understanding or contract was between yourself and me, as Superintendent of the Western & Atlantic Railroad, in reference to a wood and water station you agreed to keep up between the Etowah River and Allatoona depot. My recollection is, that you agreed, upon your part, to keep up a supply of wood

and water at the station alluded to, for the term of five years, the road paying you the customary prices for keeping up the station. My recollection is, that you required me to allow you the privilege of keeping up the station for the term of five years, in consequence of some expenditures which you stated would have to be made in order to keep on hand a full supply of water. It appears to me that it will be the interest of the road to keep up the contract with you.

"I hope, therefore, you will have no difficulties with the authorities of the road, growing out of this contract.

"Yours, respectfully, J. M. SPULLOCK."

The Court refused a new trial, and error is assigned on each of said grounds.

The bill of exceptions was certified on the 19th of December, 1870. During that month, the Western & Atlantic Railroad was leased, by the State, to the Western & Atlantic Railroad Company, in pursuance of an Act of the General Assembly. When the cause was called here, in April, 1870, counsel for defendant in error said this Court was ousted of jurisdiction by said Act, and moved to dismiss the writ of error. This Court held that it could hear the cause.

MYNATT & DELL, for plaintiff in error. As to secondary evidence: 6th Ga. R., 188; 10th, 260; 14th, 413; 2 Par. on B. & N., 305, 306; 1 Phil. on Ev., 470, note; 2d Ib., 480. If original was in hand of third person he must *testify* about: 2 Phil. on Ev., 563, 4, 5, 6, 7. Degrees of secondary evidence: Revised Code, sections 3714, 3715; 2 Phil. on Ev., 533, note, 568. Plaintiffs having performed but part could not recover for the whole: 2 Gr. Ev., 261, 261*a*; 1 Denio 317; 2 Sm. Lead Cas., 36, 37, 42. Party not entitled to same credit as disinterested witness: Revised Code, section 3820; Brown *vs.* Reed, this term. Original paper should have been established before suit brought: Revised Code, section 3910; 14th Ga. R., 194.

L. E. BLECKLEY, for defendant. The writ of error should be dismissed because, statute repealed, Superintendent out of office, and jurisdiction gone: Act 24th October, 1870; R. Code, section 975, par. 8. Superintendent to sue and defend: 19th Ga. R., 543. The Statute means Superintendent literally: Revised Code, section 4192. Only a *party* can except, etc.; 15 Ga. R., 510. Writ dismissed because plaintiff in error dead: 2 Kelly, 248. Officer out of office is officially dead: 3 Kelly, 213. Nature of bill of exceptions: 9th Ga. R., 286. Nature of writ of error: 12th Ga. R., 424. Courts must look to the law for their powers, and exercise power in *manner* prescribed. Jurisdiction withdrawn by repeal: 3 Kelley, 56; 21st Ga. R., 58; 12th, 475; 27th, 467; 1 Watts, 258, 382; 10th, 351; 3 Burr, 1456; 1 W. Blackstone, 451; 4 Yeates, 392; 7 Burr, 173; 1 Hill, 324. Secondary evidence of lost paper: Revised Code, sections 3714, 3716, 3779; 8th Ga. R., 468; 12th, 125; 14th, 252; 21st, 217; 16th, 67; 6th, 196; 7th, 264. Copy need not be established: 12th Ga. R., 509; 30th, 545. Contract sued on admitted because not denied on oath: Revised Code, section 2800; 11th Ga. R., 530. Measure of recovery: Revised Code, sections 2822, 2888, 2893; 8th Ga. R., 190; 18th, 407; 21st, 157; 3 Par. on Con. 187–8–9; 7 Hill, 61; 13 How. R., 344; 2 Curtis, 28. Newly discovered evidence: 10th Ga. R., 527–8; 9th, 4; 13th, 513. Affidavit, etc.: 16th, 33.

LOCHRANE, C. J.

The main question in this case arises upon the charge of the Judge in relation to the rule for the ascertainment of damages. Section 2888 of the Code declares, if a contract be entire, but one suit can be maintained for breach thereof. Where money is to be paid by installments, an action will lie for breach, but all the breaches occurring up to the commencement of the action must be included therein. Section

2893, speaking of the damages which are allowed for breach of contract, includes the profits which are the immediate fruit of the contract. 2d Curtis, C. C., determining what damages plaintiff was entitled to recover, lays down what we conceive to be a reasonable and just principle by which the jury should be governed. "He was entitled," says the Court, "to recover the contract price of the work, deducting the cost of finishing the work." In the case of the Philidelphia & Baltimore Railroad *vs.* Howard, 13th H., 344, it is said: "It is insisted that only actual damages, and not profits were in that event to be allowed by the jury. It must be admitted that actual damages were all that could lawfully be given in action of covenant, even if the company had been guilty of fraud; but it by no means follows that profits were not to be allowed. Understanding, as we must, the term profits in this instruction as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract, actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsum non habitam;* and in case of a contract like this that loss is among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract; for this he expends his time, exerts his skill, uses his capital and assumes the risks which attend the enterprise, and to deprive him of it, when the other party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice." The soundness and justice of this principle cannot be controverted. Where parties enter into contracts they must, in good faith, fulfil them; and when they refuse to carry out contracts into which they have entered, the party injured may pursue his remedy for damages, and the measure of the damages for such breach will be computed by ascertaining the profits of the enterprise, after deducting the legitimate cost of its execution.

Another question to be noticed is the newly discovered evidence. Was the letter of Spullock to Tumlin such material testimony as would probably have produced a different verdict. As a general principle we may remark, applications for new trials on account of newly discovered evidence, are not favored by the Courts of justice; and several things must concur to justify a new trial on this ground: First, that the evidence has come to his knowledge since the trial; second, diligence; third, materiality; fourth, that it is not cumulative; fifth, a new trial will not be granted to impeach a witness.

It appears from the testimony of Tumlin and Stegall and Spullock that the contract for a supply of water was separate and distinct, and the letter discovered may be true and yet not inconsistent with this evidence, and would not have changed the verdict of the jury thereon. We lay down as a proposition that where newly discovered evidence is reconcilable with the other proof in the case, a new trial will not be granted: 26*th Georgia*, 223. On motion for a new trial, if the newly discovered evidence will not change the result, or if there appears on the whole sufficient evidence to support the verdict, the Court will not interfere: Meade *vs.* Coustaus, Minnesota Reports, 171.

In the opinion we entertain of the facts of this case we feel satisfied that there is sufficient evidence, as to the contract for the supply of water, to sustain the verdict, and the admission of this letter is reconcilable and consistent with the facts testified to by the witnesses; and, besides, the only question raised by such proof would be to the effect that the plaintiffs were to have kept up a wood and water station at Stegall's, which would be cumulative of the testimony of Mr. Dooley, which would be no ground, by unbroken current of authorities, to have granted a new trial. The contract set up by Tumlin as made with Spullock, was to the effect that he, in connection with Stegall, were to supply water at Shanghai station, at the fixed compensation of one

r per day. He proved this by his own oath; Stegall
d it; Spullock proved it, and the fact itself of the
ing of the rams, the placing of the pipe and furnishing
e road at that point with water for two years, proved it.
radded to this, the railroad built a tank at the station.
all this proof, grouped together, made such a mass of
ıtrovertible evidence as demonstrates its truth, and out-
of all other considerations, upon the testimony submit-
o the jury and the refusal of the Judge below to grant
v trial, we do not think that there is sufficient in this
to invoke from us a reversal of that judgment.
ıdgment affirmed.

. INNIS, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

hen a party was indicted for rape, and the evidence consisted of the
secutrix, who testified she and her husband went together to see
defendant, a physician, and she went into an adjoining room to
s her husband was in, and the doctor tried to kiss her, and out of
s room into a small bed-room for the purpose of medical examina-
n, where the crime was committed, and that she resisted with all
: strength, and screamed more than once at the top of her voice,
l five witnesses were close by the room, one in a bath with only a
tition between, all near to the room, passing and repassing, and
ard no noise or screams, and saw her come out of the room, and
tified that they saw no appearance of anything unusual, and the
urt charged the jury as follows:
s a rule that a witness swearing positively to a fact, is to be believed
preference to many who swear negatively to the same fact, that is,
t they did not see or hear it. If the existence of a fact be sworn
by one credible witness, and many other witnesses who were in a
sition to see or hear it, testify that they did not see or hear it, or
ow that it transpired, you are bound to regard the testimony given
the witness who swears positively, in preference to those who swear
gatively."
l, While the general rule is, that other things being equal, positive
idence proponderates over negative evidence, the charge of the Court

was error, under the facts of this case, in stating the rule too strongly; that the jury were bound to regard the testimony of the positive witness in preference to those who testified, for circumstances may outweigh positive testimony.

2. *Held again*, In cases of rape, the question of guilt or innocence should not be measured arbitrarily by the character of the proof, whether positive or negative, direct or circumstantial; but by the weight of the proof, that all the facts should be submitted to the jury under the charge of the Court, stating the law in regard to what was necessary to establish the accusation, and the jury should be left to consider the whole evidence to ascertain the guilt or innocence of the prisoner.

See WARNER, J., dissenting from the judgment.

Rape. Evidence. Charge of Court, etc. Before Judge HOPKINS. Fulton Superior Court. October Term, 1870.

The details of this case are sufficiently set forth in the parts of the proceedings below and the opinions, for an understanding of the points decided.

When the evidence was concluded, the Court charged the jury as follows:

Gentlemen of the Jury: You begin this trial with a presumption of innocence in favor of the defendant. The law presumes him to be innocent, and that presumption continues until the State satisfies you, by proof beyond a reasonable doubt, of the defendant's guilt. The State makes the charge and must prove it. The law allows the prisoner to make to the Court and jury such statement in the case, not under oath, as he may deem proper in his defense. That statement is to have such force only as you may think right to give it. "Rape is the carnal knowledge of a female forcibly and against her will." The defendant must have had carnal knowledge of the female, Mary Meyer, that is, he must have inserted his private part into her person in the way of sexual intercourse. The extent of the penetration is unimportant, so that his part was inserted into hers. This knowledge must have been forcibly and against her will. If he used force,

d it was accomplished against her will, the crime was com-
ete.

Witnesses are to be believed, unless they be impeached in
ne of the modes which the law declares sufficient to throw
spicion on their testimony.

If a witness swears falsely, wilfully and knowingly, he is
t entitled to credit in any respect, and is not to be believed,
less the remainder of his testimony is corroborated by cir-
mstances, or supported by other witnesses. It is a rule
at a witness swearing positively to a fact is to be believed
preference to many who swear negatively to the same fact,
at is, that they did not see or hear it. If the existence of
fact be sworn to, positively, by one credible witness, and
any other witnesses, who were in a situation to see or hear
testify that they did not see or hear it, or know that it
anspired, you are bound to regard the testimony given by
e witness who swears positively, in preference to those who
vear negatively. To illustrate this and fix the principle
your minds, if you, the jury, were in a room where there
as a clock, and, after coming out, a question should be raised
to whether the clock struck a certain hour while you had
en there, if three were to swear that they heard it, and the
her nine that they did not hear it, the three must be believed
ther than the nine. But if you all had gone there for the
rpose of ascertaining whether the clock would strike at a
rtain hour, and all equally attentive, then the testimony of
would be positive. To illustrate further: if, on the trial
a criminal case, the prosecutor should swear that the de-
dant had a pistol about his person, and that he saw it
ring the quarrel between himself and the defendant, and
witness for the defense should swear that he was present at
quarrel, saw no pistol, looked attentively and closely to
if he could see anything of the sort, and must have seen
if defendant had had it about his person at the time,
positive testimony of the prosecutor would prevail over
negative testimony of the other witness. If there is an

apparent conflict of testimony, you must so reconcile it as to make all speak the truth, and not impute perjury to any, if you can possibly do so; but if there is an irreconcilable conflict, and the witnesses are equally credible, you will give credit to those who had the best opportunity of knowing the facts, and the least motive for misstating them. The Court permitted the defendant to introduce testimony tending to show improper intimacy, and an act of bastardy between the witness, Mary Meyer, and one Croft. After mature reflection I now instruct you that the testimony as to that intimacy with Croft and that act of bastardy has no legal weight or significance in this case, and will not be considered by you to the credit or discredit of that witness. That is not a mode prescribed by law for impeaching her. If the testimony excludes from your minds all reasonable doubt of the defendant's guilt, you will find him guilty. Moral and reasonable certainty is all that can be expected in legal investigation, but you must be satisfied of his guilt beyond a reasonable doubt. If the mind is wavering, unsettled, cannot be satisfied from the evidence whether the crime was committed at all, that must acquit. But the doubt must grow out of the testimony. You cannot create for yourselves a doubt and act upon it. Fancies may suggest themselves to sceptical minds to create unsubstantial doubt, or that witnesses may not remember accurately, may be mistaken, may swear falsely, etc., but such things are not allowable. To acquit upon light, trivial and fanciful suppositions and remote conjectures is a virtual disregard of the juror's oath.

If you find the defendant guilty, you will say so in your verdict. If you find him guilty you may, if you see proper to do so, recommend him to mercy. If you find him guilty and recommend to mercy, the punishment would be different, and you will be particular to render your verdict thus: We, the jury, find the defendant guilty, and recommend to mercy. If you find him guilty, you will simply say so.

The jury returned a verdict of guilty, recommending the efendant to the mercy of the Court. Whereupon defendnt, by his counsel, moved for a new trial upon the followng grounds, to-wit:

1st. Because the Court erred in not allowing defendant's ounsel to interrogate the witness, Thomas Spencer, Justice f the Peace, as to whether A. E. Cloud, witness for the dendant, had sworn on the committing trial before him, "that efendant, on the evening upon which the rape is alleged to ave been committed, asked him if he had seen or heard nything that would show that a rape had been committed n the adjoining room to that in which witness was, this evience being offered not for the purpose of impeaching the itness, Cloud, but for the purpose of sustaining the testiony of the witness, Hughes, who was sought to be imeached upon the ground that he had sworn to additional icts to what had been testified to by him on the committing rial.

2d. Because the Court erred in allowing the State, over he objections of defendant's counsel, to cause the witness, Inghes, to repeat a dialogue from the play of Punch and udy, which he stated he had been committing to memory at he time that certain facts transpired, about which he had een testifying.

3d. Because the Court erred in refusing to allow defenant to prove by the witness, Gresham, that the prosecutrix ad offered to settle this case in consideration of the payment f a certain sum of money.

4th. Because the Court erred in its charge to the jury upon he subject of positive and negative testimony, as applicable o the facts of this case, as aforesaid in said charge.

5th Because the Court, in its charge to the jury, excluded rom their consideration all evidence tending to show that he witness, Mary Meyer, had had intercourse with one Croft,

and had been the mother of an illegitimate child prior to the alleged rape, after having admitted said evidence, and having allowed counsel to comment upon it in argument to the jury. For a proper understanding of this ground, it is necessary to state that when the witness, Mary Meyer, was being cross-examined as to this fact, objection was made on the part of the State, which objection was overruled without argument. This action on the part of the Court convinced the defendant that this evidence would be considered by the jury under the charge, and the defense was conducted under this impression.

6th. Because the evidence as to the witness, Mary Meyer, having had intercourse with one Croft, and having been the mother of a bastard child by him, was admissible and proper to be considered by the jury, and the Court erred in charging to the contrary.

7th. Because the charge of the Court, as a whole, was calculated to exclude from the jury the consideration of defendant's evidence.

8th. Because the Court erred in the portion of its charge as to doubts.

9th. Because the Court erred in ruling, when defendant's counsel opened the case to the jury, that law must be read to the Court and that the jury must take the law as given them in charge by the Court.

10th. Because the verdict was contrary to law, the evidence, etc.

11th. Because of the newly discovered evidence of J. J. Meador.

12th. Because the Court erred in charging the jury that the evidence tending to show that the witness, Mary Meyer, had had improper intercourse with one Croft, and had an illegitimate child, was not to be considered by the jury after having admitted the same by an express ruling, for the defendant would otherwise have proven by one Dr. Rosenberg

that the witness, Mary Meyer, was suffering from gonorrhea a short time before the rape is alleged to have been committed, which evidence, under the first ruling of the Court, was considered unnecessary.

(NOTE BY THE JUDGE.—The defendant did not offer to prove on the trial or at any other time the matter here stated, nor did he attempt to show that Dr. Rosenberg would prove such fact. I do not certify that he would have made the proof.)

The Court refused a new trial, and error is assigned on said grounds.

L. J. GARTRELL, HARRY JACKSON, for plaintiff in error.

E. P. HOWELL, Solicitor General, for the State.

LOCHRANE, C. J.,

Without going into the mass of testimony in this case, we may briefly remark that the defendant was indicted for the crime of rape, and was brought to trial in the Court below and convicted. He moved for a new trial on several grounds, one of which only, we propose to review as the grounds of our judgment in this case, viz: "That the Court erred in its charge to the jury upon the effect of positive and negative testimony under the facts of this case."

The evidence shows that the prosecutrix went with her husband to the office of the prisoner, who was a physician. She went from the room where her husband was seated to an adjoining room, and the doctor asked her if she had any other man beside her husband. Her reply shows that she had one before, and, on cross-examination, it appeared she had had a child by him. The doctor took her by the hand, into a small room with a bed in it, and there, she says, committed the offense, by pushing her down on the bed. She states that

she halooed as loud as she could more than once. She also states that she saw a man in the bath-room as she went from the second room to the room where the crime is alleged to have been committed.

The defense consisted of some five witnesses; one describing the plan of the house, and the partitions and the bath-rooms, the door to the room being upright plank, not reaching close to the top, etc. One, who was in the bath-room, divided by a partition of upright plank from the bed-room, saw them go into this room, and he saw her come out, heard no noise in the room, nor screaming, and saw nothing unusual in the appearance of either coming out. Another witness, off one room from the bed-room, taking a bath, heard no noise, etc. Another female witness who was about and saw her as she came out, saw nothing to cause her suspicions, etc., no appearance of tears, nothing unusual in her manner, etc., she had walked by the bed-room door, and heard no screams like a lady's voice or of anything of that sort. Another man who was waiting on the baths, and passing and repassing, testified to the same facts. Another man who was passing and repassing the room on a piazza some four or five feet from the door, stated the same facts.

Under this statement of facts, our distinguished brother who presided at the trial, charged the jury: "It is a rule that a witness swearing positively to a fact is to be believed in preference to many who swear negatively to the same fact, that is, that they did not see or hear it. If the existence of a fact be sworn to positively by one credible witness, and many other witnesses who were in a situation to see or hear it, testify that they did not see or hear it, or know that it transpired, you are bound to regard the testimony given by the witness who swears positively in preference to those who swear negatively." He then detailed the familiar illustration about the clock striking, and the case of *The State vs. Fitzgerald*, in 12th Georgia Reports.

Was this charge a fair presentation of the law applicable to cases like this under the facts of this case? Judge NISBET, in 3 *Kelly*, page 420, says: "The rules of evidence in indictments for rape are different from what they are in ordinary cases. The offense is peculiar. Lord Hale says, 'this accusation is easily made, hard to be proved and harder to be defended by the party accused, notwithstanding his innocence: 1 Hale, 635, 636.' Citing Chitty 3, 572: 'The defendant in consideration of these things is let in, in his defense, to some privileges which are not always allowed to persons accused of crime."

The considerations which are given for the rule is, that the crime is generally in secret, and there is a consequent absence of direct testimony. The evidence of the prosecutrix is admitted, while that of the accused is excluded. Men are, therefore, put in the power of abandoned and vindictive women to a great extent.

Blackstone says: "The party ravished may give evidence upon oath, and is, in law, a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact concurring in the testimony."

To make out this case against the accused it is necessary to prove that the act was committed by force. *Force to overcome resistance* must have been accompanied by some manifestations of violence. The witness swears she screamed as loudly as she could more than once.

In *Palfus vs. State*, 36 Georgia, 280, where the question was about a disorderly house, and the defense was by parties who lived above and in adjoining rooms, that they did not hear it, the Court says: "It may be that the jury did not give due weight to the testimony on the part of the defendant, from the impression probably that it was altogether negative in its character." Thus laying down the rule that negative testimony, when in affirmance of facts sought to be established, becomes positive.

And in *Bowie & Company vs. Maddox & Goldsmith*, 29 Georgia, 285, this Court, Judge STEPHENS delivering the opinion, held it was error in the Court below to charge the jury, "that circumstances cannot outweigh positive testimony." The Judge says: "We think the Court erred in charging the jury that circumstances could not outweigh direct testimony. Direct or positive testimony might come from a very unreliable person, or coming from a source of great respectability, might yet break down under the weight of its own absurdity. It is impossible, therefore, to fix any uniform value upon direct or positive testimony, as such. It is equally impossible to fix a uniform value upon circumstantial evidence, as such. In many cases the one justly outweighs the other, while in many others the preponderance is precisely reversed."

And again, Judge LUMPKIN, in 26 Georgia Reports, 192, sums up the rule and says: "As to the charge respecting positive and negative testimony, no general rule can be laid down respecting it. It depends upon a variety of circumstances, such as the opportunity of the witnesses for hearing, the attention being directed to the matter, etc." And this principle has been often held in both civil and criminal cases.

In Pollen *vs.* Servy, 10 Bosw., New York, 38, negative testimony was held to be properly weighed by the jury against positive testimony.

In Reeves *vs.* Poindexter & Jones, North Carolina, 308, where A. swears that B, C and D had a conversation, and D swears no such conversation took place, held, the rule giving preference to positive over negative testimony, did not apply.

In Woods *vs.* Studevant, 38 Mississippi, 68, facts and circumstances were held to outweigh the positive testimony of a witness.

The rule as laid down in Alabama, Pool *vs.* Devers, 30 Alabama, 672, is: When one witness swears positively and another negatively, both being credible, greater weight is to be given to the former.

In the case of Coughlin *vs.* The People, 18 Illinois, 266, it was held "the testimony of a witness having a full opportunity of knowing that a person did not strike a blow is affirmative evidence, and entitled to weight as such."

The rule in 27 Alabama, 520, on the effect of positive evidence is, that it is entitled to greater weight.

In the case of the State *vs.* Gates, 20 Mississippi, 5 Bennett, 400, when one witness swore two men on horseback met and had an angry conversation, and another witness swears he saw them meet and they did not, and the Judge charged that when one witness swears affirmatively and another negatively, the affirmative must prevail, the charge was held to be error. The rule in the case of Coles *vs.* Perry, 7 Texas, 109, is that greater weight will be given to positive than negative testimony.

In 23 Vermont, 186, it is laid down as a rule of law that, other things being equal, positive evidence preponderates over negative evidence; but the Court, in charging the jury, should also direct their attention to the facts and circumstances in the case important to determine its application.

And this, upon the principles found through our decisions, may be asserted as the rule. We are aware of some cases where the expression of the rule is in stronger language, but in others substantially the same. If there be any case where even a spark of evidence should not be excluded from the consideration of the jury, we think it is in cases like the one at bar. The charge of the Court in this case is a strong declaration of the rule, "you are bound to regard the testimony given by the witness who swears positively in preference to those who swear negatively." This language we hold to be too emphatic, and calculated to mislead the jury under the facts in this case.

In *Smith vs. Overby*, 30 *Georgia*, 241, this Court held that, "although a charge be literally correct, still, if the language was calculated to mislead the jury upon a material point, a new trial may be awarded."

We think, under the facts of this case, that the question of guilt or innocence was not to be measured by the character of the proof but by the weight of the proof itself. All the circumstances of the case ought to have been submitted, and the law in regard to what was necessary to establish the charge should have been clearly stated and the jury should have been left to consider for themselves the weight of the evidence in the case.

If the rule laid down be true, then, in cases of this kind, there would scarcely be a defense, except the crime was committed in the presence of others, which is not natural; and even then, if the jury are bound to take a positive witness against many negative ones, the accused would be left at the mercy of the jury. I hold that, while it is the duty of Courts to protect female chastity by every proper protection of the rules of law, still, in cases of this character, care should be taken not to sacrifice justice to sentiment; and negative testimony may be more properly considered by juries to illustrate innocence in this than in other classes of cases; and the instructions of the Court upon its weight as against the positive evidence, particularly if that comes alone from the prosecutrix, should not be technical, but liberal and comprehensive, and leave the question of guilt or innocence to their decision, not upon the theory of an artificial rule, but upon a sound conviction of the truth of the case, to be gathered from every source and circumstance admitted in evidence.

Judgment reversed.

McCay, J., concurred, but furnished no opinion.

Warner, J., dissenting.

The defendant was indicted for the crime of rape on the person of Mary Meyer, a married woman, who, with her husband, went to the office of the defendant (who was a physician,) for the purpose of consulting him in relation to a female complaint, with which she was afflicted at the time.

The defendant took her into his private bed-room for the purpose of making an examination of her person, where the crime was alleged to have been committed. On the trial of the case, the jury found the defendant guilty, when a motion was made for a new trial, on general grounds, which was overruled by the Court. Whereupon, the defendant excepted, and has brought his case before this Court for review. There was no error in the Court below in ruling out the evidence of Mary Meyer (after the same had been admitted) that she had an illegitimate child by one Croft prior to her marriage with her present husband, as such evidence was not competent for the purpose of showing her general bad character at the time the crime was alleged to have been committed. General bad character as to want of chastity cannot be shown by proof of a specific act which occurred long anterior to the commission of the offense.

There was no error in the Court ruling out the evidence of Spencer, the Justice of the Peace, as to what Cloud had sworn on the committing trial before him, as the evidence on that trial had been reduced to writing, and was then before the Court, and was the best evidence as to what the witness did swear on that trial, the more especially as Spencer stated he had no recollection as to what the witnesses did swear except by reference to the record of the evidence then before him.

The charge of the Court to the jury, as to the effect of affirmative and negative testimony, as applicable to the facts proved in this case, was a fair and substantial exposition of the law of evidence upon that question.

After reviewing the entire charge of the Court to the jury, in view of the facts contained in the record, there is no error in that charge, which will, in my judgment, authorize this Court to interfere and grant a new trial. In looking through the entire record, and considering all the grounds taken in the motion for a new trial, I find no error which will entitle the defendant to a rehearing of the case, under the repeated rulings of this Court, on similar motions made on the trial

of criminal cases. And as the presiding Judge was satisfied with the verdict, and there being sufficient evidence in the record to sustain it, if the jury believed the witnesses, who were the exclusive judges of their credibility, this Court ought not to interfere and set it aside. The criminal laws of the State should be firmly executed by the Courts, and when a verdict of guilty has been rendered on competent evidence, that verdict should not be set aside for alleged errors committed on the trial, unless the finding of the jury would have probably been different but for the alleged errors complained of. The *certainty* of punishment for the violation of the public laws of the State is the only safe protection for society, and when the public authorities, charged with the performance of this duty, fail to perform it, those who are injured, either in person or property, will seek to redress their own wrongs instead of appealing to the legal tribunals of the country.

C. WALLACE, Superintendent Western & Atlantic Railroad, plaintiff in error, *vs.* WILLIAM C. SANDERS, defendant in error.

A suit was brought against the Western & Atlantic Railroad for the loss of personal property delivered to them at Dalton for transportation to Atlanta, and plaintiff proved that the property sued for was put on board the railroad cars, and was lost. The evidence for the defense consisted, in part, of an original receipt, produced by plaintiff, or notice, as follows: "Received of Mr. W. C. Sanders, (stating the property,) for shipment to Atlanta, at his own risk," and the testimony of the agent, which showed that, at the time, General Johnston's army was in Dalton, and the cars were taken by the military at their pleasure, and that shipment of private freight was generally understood to be at the owner's risk, and that all shippers knew it was not uncommon for the military to take the cars and throw such freights out, and that he believed defendant knew of the risk, and that he had to take it. It further appeared that the car loaded with plaintiff's goods at Dalton, consisting of a wagon, two mules and a horse, was

found next morning in Atlanta, loaded with Confederate horses, a part of the wagon found lying near the depot at Dalton. Upon this statement of facts, the Judge charged the jury that the stipulation in the receipt, that the property was shipped at owner's risk, was no protection to the road unless the property was proven to have been taken by the Confederate army from the cars, and the jury found for the plaintiff, and the Court below refused a new trial:

Held, That the charge of the Court, under the facts, was too narrow a view of the law providing for express contracts by railroads; that while the general proposition of law laid down is in the language of the Code, there were facts in this case arising not only from the presence of an army, but the character of the receipt given, and the evidence of the agent as to plaintiff's knowledge and consent thereto, which ought to have been submitted to the jury under the evidence, to say whether or not he had knowledge of the contents and consented thereto; for this would limit the liability, if the jury believed from the evidence that it was an express contract. And whether it was or was not, was a fact for the jury, which ought to have been submitted to them under all the evidence in this case.

Held, again, If the jury were satisfied, from the evidence, that the car was taken by a superior force, which the defendants could not resist, still it was the duty of the Court to instruct the jury touching the requirements of care of the goods by the defendants after they were thrown out of the car, or the existence of such circumstances as prevented its exercise, and that the jury ought to have the whole matter fully before them, upon the law applied to the facts; 1st, as to whether there was an express contract between the parties; and, 2d, as to the care taken, if any, or reason why it was not done by the defendant or its agents, relative to the goods, if the jury believed they were thrown off by the military authorities.

Common-Carriers. King's Enemies. Diligence. Before Judge HOPKINS. Fulton Superior Court. November Term, 1869.

This cause is reported in the opinion. It was tried before Judge Pope in November Term, 1869. A new trial was subsequently refused by Judge Hopkins.

MYNATT & DELL, for plaintiff in error. As to express contract: 39th Ga. R., 617. W. & A. R. R. not embraced by section 2042 R. Code: 37th Ga. R., 240. Before Code, common-carrier might limit liability: 21st Ga. R., 526.

WILLIAM EZZARD, for defendant. Common-carrier cannot limit liability by receipt: R. Code, sec. 2042.

LOCHRANE, C. J.

This was an action brought by Sanders against the Western & Atlantic Railroad for the loss of personal property, consisting of two mules and one horse and wagon, alleged to have been delivered to the railroad at Dalton for transportation to Atlanta. The plaintiff proved the property was put on the cars and was lost.

The original receipt, which was produced, upon notice, is as follows:

"Received of Mr. W. C. Sanders, one horse, two mules and one wagon, for shipment to Atlanta, at his own risk.

(Signed) JOHN F. REYNOLDS, Agent.

Dalton, February 22d, 1864."

And Reynolds, testified, among other things, that the army of General Johnston was at Dalton at the time; that the military took the cars and did as they pleased about the control of the road, seizing anything they wanted, without any consultation with the officers of the road; that shipment of private freight was generally understood to be at the owner's risk; that all shippers knew the risk; that it was not uncommon for the military to take the cars and throw freight out; that he is satisfied the defendant in error knew of the risk, and that parties shipping had to take the risk.

It appeared the wagon was found the next morning near the depot at Dalton, and the same car in which this freight was, was found next morning at Atlanta, full of horses belonging to the military authorities.

The Court, under these facts, charged the jury that the stipulation in the receipt, that the property was shipped at the owner's risk, was no protection to the road unless the property was proven to have been taken by the Confederate

army from the cars. The jury found for the plaintiff, and a motion for a new trial was made upon exception to the charge of the Court, and that the jury found contrary to the evidence and law, which was overruled.

And the main and controlling question of this case, in our judgment, is as to the charge of the Court. We have laid down the rule, over and over again, that, when no rule of law has been violated in submitting the case to the jury, and there is evidence to support the verdict, and the Court below has refused a new trial, we will not interfere. But we must be satisfied that the Court, in submitting the law of the case, has done it fairly and intelligibly to the jury.

And under the facts in this case, we are not satisfied with the charge of the Court. It withdrew from the consideration of the jury all the benefits of defense arising under the principle of express contract, that the goods were shipped at the owner's risk. If we go back to this occurrence and take into consideration the condition of the public affairs at Dalton, an army in the locality, and the consequent derangement of private business, we can well see why the road should require the shipper to take the risk of the transportation, and why the strict rules of law should be disregarded in the light of existing circumstances at the time. There is evidence here that he did not know the general terms upon which private freight was shipped. There is evidence that he loaded the car himself; that this receipt, taken out of his possession, was brief, pointed, and express that the shipment was at his risk. Section 2042 of the Code provides: "A common-carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given, or by tickets sold," etc. But there is something in the character of this receipt that might authorize the presumption of actual knowledge of the contents of it. In 37 *Georgia Reports*, the Court regarded a "fair opportunity to understand the terms of a contract" as governing the parties, the distinction being clearly defined that the railroad cannot *by any act of*

its own limit its liability. But, if the act has the consent of the other party, then the rule changes and the stipulation becomes a contract, governing the parties in the particular case.

Now the doctrine summed up in 39 *Georgia Reports*, 635, is "that the carrier may, with the assent of the owner, make a special contract, in the face of the receipt, which will limit his liability." And this general proposition is the universally acknowledged rule of law sanctioned by all Courts, State and Federal.

The charge of the Judge below, under the facts of this case, upon the naked doctrine of the Code, section 2042, was too narrow and limited. The written receipt given, its brevity and statement, taken with the then condition and surrounding circumstances, afforded something for the jury to consider as to whether its terms had been assented to, something which went to shew he had actual notice of its contents; something to show that there was a fair opportunity to understand its terms; something which imported knowledge and consent. But taken with the testimony of Mr. Reynolds, and his assertion of the general understanding of all, and that this shipper knew that shipments were only made at the risk of the owner, we are of opinion that the Court ought to have submitted the question in this aspect to the jury.

Again, as to the question of liability growing out of the act of the military. If the jury were satisfied that the car was taken by a superior force, which neither the road nor its agents could resist, we are nevertheless of opinion that the defendants below ought to have shown something more than is here shown by the record touching the care of the goods after such act by the military, or account for the reasons out of which this omission was occasioned. Conceding the fact that this was a special contract at owner's risk, still there was devolved upon the defendants proper care over the property while on the cars and while remaining in their custody, or the existence of such circumstances as prevented its exer-

cise. We appreciate the derangements of business in the midst of an army, and the fact that where law ceased to give protection the ordinary rules may be relaxed, yet the jury ought to have the matter fully before them. If a watchman was there, what was done to take care of the property when thrown off, or if not there, why? There may or may not be ample and satisfactory reasons; but we are of opinion such should be made to appear. We reverse the judgment of the Court below that the whole case may go to the jury under the charge of the Court upon the law.

E. A. TURNER, plaintiff in error, *vs.* JOHN K. MCCARTER, defendant in error.

Where a suit was pending against two joint and several obligors, one of whom claimed to be security only for the other, and this was known to the plaintiff, and the principal had filed a plea to the merits of the action, and the plaintiff, without the action or consent of the surety, and after the surety, satisfied that no trial could be had on the plea at that term of the Court, had gone home, dismissed his suit as to the principal, to get clear of the plea, and then took a judgment against the surety, and the surety filed a bill to enjoin the judgment, alleging these facts, and alleging. further, that at the time the suit was dismissed against the principal, the debt was barred by the Statute of Limitations, and if the surety paid the debt, he was, by this act of the plaintiff, deprived of his rights to recover it from the principal:

Held, That there was equity in the bill, and the Judge, on the facts of the case, as they appeared on the bill, answer and affidavits, ought to have granted the injunction until the trial could be had on the case made by the bill.

Injunction. Principal and Surety. Practice. Before Judge HOPKINS. DeKalb county. Chambers. February, 1871.

In 1863, E. A. Turner and H. H. Weaver gave to McCarter a promissory note, signed by them, and due on the

12th of March, 1863. In 1869, McCarter sued them thereon as joint promissors. No plea appears by the record. At September Adjourned Term, 1871, McCarter's attorneys dismissed, as to Weaver, and took a judgment, by default, against Turner. *Fi. fa.* issued and was proceeding to sell Turner's property. He prayed for an injunction. He averred that he was, in fact, but Weaver's security, and that McCarter knew it; that Weaver had filed a plea, which is lost, and the cause had to stand for trial before a jury, in its regular order. He said he filed no plea, because he was willing for a judgment to go against him and Weaver, jointly. That the plaintiff's attorneys waited till the last day of the term, when it was obvious that said cause could not be reached in its order as a cause at issue, and, after he had left Court, dismissed as aforesaid, without notice to him, and took said judgment. He said he should not be compelled to pay the note, because by such action of plaintiff's counsel, suit against Weaver was forever barred by the Limitation Act of 1869. Further, he said said judgment was void, because plaintiff had filed no affidavit of payment of taxes, nor proved their payment, as required by the Relief Act of 1870.

The Chancellor ordered McCarter to show cause why the injunction should not be granted. The answer admitted all the statements in the bill, except the loss of Weaver's plea, and that Turner was but Weaver's security. It stated that Weaver's sole plea was that, in 1863, he had tendered McCarter Confederate currency in payment of the note, which he refused, and which Weaver kept for him till it was worthless, and it charged that Turner was a principal debtor. On the hearing, there was evidence, *pro* and *con*, as to the alleged securityship of Turner. The Chancellor refused the injunction, and that is assigned as error.

J. B. STEWART and L. J. WINN, by L. B. SPENCER, for plaintiff in error. Obligation and rights of sureties: R. Code, secs. 2122, 2138; 19 Ga. R., 551. As to laches in

defending: 1 Ga. R., 136; 2d, 275; 3d, 78; 4th, 181; Dan. Ch. Pr., 141; R. M. Charlton's R., 93. Surety not bound to plead: R. Code, secs. 2139, 3128. As to tax, etc.: Acts 1870, p. 31.

HILL & CHANDLER, by the REPORTER, for defendant: Weaver had his day in Court: R. Code, secs. 3621, 3537. Judgment set aside for fraud or laches, unmixed with negligence or fault of movant. Act of 1870 unconstitutional.

MCCAY, J.

The record in this case shows that the defendant, having a suit pending against the complainant and Weaver, to which Weaver had filed a defense, dismissed it under such circumstances as, in law, to discharge the complainant from the debt on which the suit was founded.

Complainant sets up that he was, in fact, only security on the note, which McCarter well knew; that being only security, he rested upon Turner's defense, and filed no plea of his own; that he stayed in attendance at the Court until it was well ascertained that the case, it being, as a plea was filed, a jury case, would not be tried, that after he had gone home, and just before the Court adjourned, the plaintiff in the suit, McCarter, in order to get clear of Weaver's plea, dismissed the suit as to him, and as the case was then without a plea, took a judgment against the present complainant, by the Judge's order on the minutes, under the new rules of the Court. The bill charges that, at the time the suit was dismissed as to Weaver, the note was barred by the statute of limitations, and that the necessary effect of the dismissal was to injure the complainant by depriving him of his right to go upon Weaver, the principal, in case he paid the money.

If these facts be true, we think the case a clear one for the complainant. Here was an act of McCarter, which "increased his (complainant's) risk, exposed him to greater lia-

bility, and injured him:" Revised Code, 2126. Here is a case in which, by *the act of the creditor*, "the liability of the principal became extinct:" Revised Code, 2121. This act of the principal did not and could not have come to the knowledge of the surety until after the judgment against him.

It is an every day exercise of chancery jurisdiction to grant a new trial and enjoin a judgment at law in consequence of the discovery of a defense which the complainant did not know of, and could not, with proper diligence, have known before the judgment at law: 1 *Georgia Reports*, 136; 2 *Georgia Reports*, 275; 3 *Georgia Reports*, 78; 4 *Georgia Reports* 181. This defense did not accrue until a few minutes before the judgment, and from the very nature of it could not have come to the knowledge of the security. We are clear, therefore, that if the complainant has stated the facts truly, he has a strong claim to relief. The answer admits all the facts but one; especially, does it admit the amendment dismissing the suit as to Weaver under the circumstances charged. The fact not admitted, but positively denied, is that the complainant was Weaver's security. We are not sure that the complainant would not have the same ground of relief, if he is to be considered a joint obligor instead of a security. It was a serious wrong against Turner for McCarter to dismiss the suit *versus* Weaver under the circumstances. A creditor has no right to act so as to discharge one joint obligor to the injury of his co-obligor. And even under the state of facts set forth by McCarter, however the parties might stand as to him, as between themselves Weaver was the principal, and the loss of the debt as against Weaver would be a total loss to Turner if he has it to pay.

But we think the evidence that Turner was only surety, even as to McCarter, is very strong. On one side we have the statement of Turner and of Weaver, of two of the arbitrators and of Norton. On the other, the statement of McCarter, and of two others, both of whom, however, only testify

negatively, to-wit: that they did not hear the statements testified to by the other witnesses. The evidence for the complainant largely preponderates, and we think the injunction ought to have been granted. Indeed, we suppose the refusal of the Judge was not put on the facts but on the law, and on the effect of the judgment. But as we have said, this was not under the circumstances a bar, and we reverse the judgment.

Judgment reversed.

HUGH MCCULLOUGH, plaintiff in error, *vs.* THOMAS P. MITCHELL, defendant in error.

An award of arbitrators under the arbitration law will not be set aside on the ground that it is illegal, because contrary to the evidence, unless it be so contrary to the evidence as to require the inference that it is the result of fraud, accident, or gross mistake of law or fact on the part of the arbitrators; and if an award has been attacked upon this ground before the Superior Court, under the provisions of section 4184 of the Revised Code, and the question has been submitted to a jury, who have found in favor of the award, and the Judge has refused a new trial, it must be a very strong case, indeed, to justify this Court in overruling the Judge and directing a new trial.

Arbitration. New Trial. Before Judge KIRBY. Floyd Superior Court. July, 1870.

In May, 1867, there was a controversy between Mitchell and McCulloch respecting the sale and purchase of Mitchell's interest in the Rome Foundry and Machine Works by McCullough. And whereas, they desired a "a fair and equitable adjustment of the same," they submitted to their attorneys: 1st. Whether McCullough was deceived by Mitchell's representing to him that the property had cost him $23,000 cash, including his salary, it being admitted that Mitchell so stated. 2d. If it had not cost him so much, whether McCullough was entitled to any abatement of the agreed price, and

if any, how much. 3d. Whereas, Mitchell represented to McCullough that the agreed price, $16,000 00, and Mitchell's liabilities, which McCullough was to assume, would not exceed $25,000 00, if the liabilities exceed $9,000 00, how much, if any, abatement should be made on that account? Their attorneys had a right to select an umpire, and to have anylegal differences decided by the Judge of the Superior Court, Hon. J. W. H. Underwood.

The umpire was chosen and the cause was tried. It appeared in evidence that Noble & Brothers were Mitchell's partners in said property, and Bayard was their book-keeper; that McCullough, residing in New York, went to Rome seeking an investment, heard that Mitchell wished to sell; that he sought information from Noble & Brothers, who wished him to buy, and from Bayard, as to the cost of the works, Mitchell's liabilities, and what he had paid in, etc., and then went to see Mitchell. He was at Lynchburg, and had not been in Rome for several months. Mitchell made said representations, and McCullough agreed to pay him said price for his interest.

The arbitrators found that Mitchell had not paid in $23,000 00 cash, and that his liabilities were over $9,000 00, but they concluded, from the evidence, that his representations were *bona fide*, and that what else he said as to the value of the property was only his opinion. Considering that McCullough had investigated for himself, etc., they awarded that no abatement in price should be made. While the arbitration was being had, Judge Underwood was present, and it was shown that he assisted in making certain calculations.

When the award was entered upon the minutes it was objected to, because of Judge Underwood's action aforesaid; because the award was contrary to the evidence; because the arbitrators decided according to certain supposed law, and ct according to equity, and were mistaken as to the law, because of the admission of certain letters. It was

shown that no objection was urged against said letters. It was shown that Judge Underwood had his headquarters in the office where the arbitration was had, and nothing appeared to show any interference with the arbitrators. The objections were tried, and the jury found in favor of the award.

A new trial was moved for, upon the following grounds:

1st. Because said verdict is contrary to law.

2d. Because said award should have been set aside for a mistake in law on the part of the arbitrators.

3d. Because said award ought to have been set aside on the ground that it is contrary to law and is otherwise illegal; and on the ground that the arbitrators did not make an equitable adjustment of the matters of difference between the parties as required by the submission in writing.

4th. Because said finding of the jury is illegal, and not in accordance with the testimony produced on the submission.

5th. Because said award ought to have been set aside upon the testimony produced, and the facts stated in the submission and exceptions to the award, and the *award itself.*

6th. Because the Court erred in not ruling out the letters which said Mitchell had written to Charles H. Smith, his agent, when offered in as testimony, they being objected to on the arbitration as shown by the exceptions.

7th. Because the Court erred in not giving to the jury the following charges without qualification, each charge as asked, having been requested to do so in writing, to-wit: "If you believe from the evidence that McCulloch was entitled to any abatement of the amount he had agreed to pay, either at law or upon an equitable settlement, then the award was wrong, and you should find against it,"—the Court adding after reading the charge—"so far as the same is consistent and agrees with my main charge."

8th. Because the Court erred in giving to the jury the following charge, to-wit: "The law providing for the arbitration of matters of difference between parties, means that

some progress should be made in the settlement, and not that, after all the testimony has been heard and the case *fairly tried*, without accident, fraud, or mistake, the parties may continue to litigate. Whatever was fairly settled for the parties should remain so; and if, in the investigation you are about now to make of this case, you should find all the questions, made by the exceptions filed, to have been fairly settled without accident, fraud, or mistake, it will be your duty to find for the award. You are not to weigh the testimony as upon an original trial between the parties. You are more nearly in the position of a reviewing Court. Your duty is to look into the facts and decision of the arbitrators upon this case, and if they have been influenced by the intermeddling of any person, or have made the decision complained of, by fraud, accident, or mistake, it will be your duty to set it aside; but if in the consideration of all these questions there was the least bit of testimony to sustain the decision which was made by the arbitrators, then the award ought to stand. If there was any testimony for the finding of the arbitrators, upon any or all of the objections, the finding would be good under the law and ought to stand."

Said motion for a new trial was overruled by the Court upon each and all of the grounds thereof, and counsel excepted.

PRINTUP & FOUCHE, for plaintiff in error. Innocent misrepresentation is legal fraud: R. Code, secs. 2592, 5117; 2 Kelly R., 66; 36 Ga. R., 648. Cases of Wootten and Goolsby, 26 and 23 Ga. R., relied on by arbitrators, not law. The charge was wrong on usury, "*fairly tried*," and such like expressions.

WRIGHT & FEATHERSON; T. W. ALEXANDER, for defendant.

IcCAY, J.

'his Court, at this term, in the case of *Tomlinson vs. Tom-*
on, and in various other cases, within the last few years,
: *Shaiffer & Company vs. Baker & Carswell*, 38 *Georgia*
orts, 135; *Sharp & Brown vs. Loyless*, 39 *Georgia Re-*
s, 9, and in several cases at the last term, has required a
ng case to set aside an award, because contrary to the
lence. It is of very doubtful policy, and only just,
ıin the authorities, to listen *at all* to such a ground. The
ies freely select their own tribunal. The very object is
ettle the dispute without litigation, and it is a perversion
he whole intent of the law to permit a mere difference
udgment, as to the effect of evidence to be a ground for
ng aside the award. If the ideas advanced by the coun-
'or the plaintiff in error be true, an award is only one
le of commencing a suit, instead of being, what the law
:emplates, the end of litigation. The evidence must be
trongly against the award as to *require* the inference of
d or mistake in some material matter, either of law or
. Here is, first, the judgment of three intelligent men,
ı of a jury, and then of the Judge, upon a complication
acts, and *figures*, and *motives*. The plaintiff in error is
pinion this concurrent judgment of three tribunals is a
ıt error.

We will not say that such a thing is impossible, but we
say it is very improbable. The right of the case turns
much upon whether, in fact, McCullough *acted* on the
ements of Mitchell. Is it clear that he did? It is true
ays so. But is there not a great deal against this? He
a stranger to Mitchell. He had seen the property, ex-
ned it, conversed with the Nobles, the book-keeper, and
seen the books. He had, in truth, about as good an
ortunity to get at the truth as Mitchell. It would be
strange, very contrary to the ordinary course, for a man
bandon all these sources of information and trust to the

statements of a stranger, whom he knew was interested in making a strong case for himself.

We are not, ourselves, satisfied with the statement of either Bayard or the Noble's; they are doubtless very correct men; but it is apparent that they are disposed in favor of McCullough. We do not, upon the whole, think this award, verdict and judgment of the Court, is such a gross perversion of the facts of the case as to justify us in setting it aside.

We do not care to go into detail of our reasons, but simply say, that if Mr. McCullough, after all the opportunities he had to get at the truth, shut his eyes and allowed himself to be deceived by the statements of Mitchell, a stranger, and, as he knew, interested, we do not think he has any great claims to sympathy. We suspect he thought he was doing well, and that the statements of Mitchell as to the cost did not, in fact, have much to do with his conduct. What the property had made, was making and would make, was the principal thing. Of this he got his knowledge from Noble, the books, and his own observation and inquiries at Rome, and if he was mistaken, it is only the ordinary result of the fact, that mankind are not omniscient.

Judgment affirmed.

BENJAMIN LOUGHBRIDGE, plaintiff in error, *vs.* W. G. HARRIS, defendant in error.

When in an action brought to recover damages for the overflow of land by the erection of a mill-dam, the defendant pleaded in bar the award of appraisers under the Act of 1869, and tender of payment, etc., and the Judge sustained the demurrer to the plea, etc:

Held, That the Act of 1869, which extends the provisions of the fourth section of the Act to incorporate the Zebulon Branch Railroad Company (1851-52,) to all manufacturing companies and individuals, whether corporate or not, provided such company or individuals own

both banks of the stream upon which the mills are to be erected, etc., and provides for the assessment of damages for such taking of lands as may be necessary, is unconstitutional in its provisions, as applied to individual owners of mills in this State.

Held, *again*, Under Article III., Section 5, part 1, of our present Constitution, and the grant of power to the Legislature to take private property for public use, that the exercise of this power is one over which the judiciary have jurisdiction to prevent its abuse. And to authorize the taking of private property by legislative Act, two things must concur:

1st. It must be taken for public use only.

2d. It must be taken only upon provision for just compensation, except in urgent and extraordinary cases. And while we recognize the right of the Legislature to determine the necessity of the act, and when it is constitutionally exercised, and when it is for the public use, and provision for just compensation has been made, yet this is not a power which the Legislature can delegate to individuals, to erect mills or manufactories anywhere at their option, and in their judgment take private property for their use; and we do not think a mill, although it has some of the attributes of public use, and is regulated by law for certain defined purposes, can be regarded *such public use* as the Constitution recognizes, to authorize the exercise of this great constitutional power.

Private Property for Public Use. Mills. Before Judge PARROTT. Murray Superior Court. May Term, 1870.

Harris sued Loughbridge for backing the Conasauga River upon his land.

Loughbridge pleaded that he owned land on both sides of the river below Harris, was erecting a mill-dam, which rendered such overflow necessary, that Harris refused to have his damages appraised as provided by Act of 19th of March, 1869, when he proceeded to have it done as therein provided, tendered Harris the amount assessed and he refused to accept it, and that he was ever ready to pay said amount. Upon demurrer, the Court dismissed said plea. That is assigned as error.

D. A. WALKER, J. A. W. JOHNSON, for plaintiff in error. Constitution of 1868 does not prohibit taking private prop-

erty for public use without compensation. Eminent domain, and when and by whom exercised: R. Code, secs. 2196, 2197, 2198; 9th Ga. R., 341, 344, 354–5; 9th, 41; 2 Kent's Com., 341; 3d Ga. R., 338; 1st Redf. on R. Ways, 258. Mills are for public use and regulated by law: R. Code, secs. 1466, 1467, 1468.

McCamy & Shumate, for defendant. Act of 1869 void because it does not provide for just compensation: 30th Ga. R., 43; 37th, 113; 33d, 556, 629; 11th Leih. R., 78; U. S. Const., Art. V. Compensation must be paid before property taken: 1 Kent's Com., 339 and note; 26th Wend. R., 497; 3 Howard's Miss. R—Thompson vs. G. J. R. R. Co.; 1st Kelly, 530; 9th Ga. R., 341; 19th, 479; 33d, 556, 629. Act contains matter not in title: Constitution of Ga., 1868, Art. III., Sec. 4, p. 5; 12th Ga. R., 43; 4th, 26. Eminent domain delegated to individual void: 1st Bl. Com., 339.

Lochrane, C. J.

This was an action on the case brought by Harris for the overflow of water upon his land, caused by the mill-dam erected by Loughbridge. When the case came on for trial, the Judge below sustained the demurrer to the plea filed by the defendant, under the Act of 1869, in bar of the action. There is no question as to the merits of the case before us.

The naked question is the construction of the Act of 1869. That Act is entitled "An Act to encourage and protect the building of mills and other manufacturing establishments in this State." This Act provides that the provisions of the fourth section of an Act to incorporate the Zebulon Branch Railroad Company, shall be extended to all manufacturing companies and individuals, whether corporate or not, provided the company or individual owns both banks of the stream upon which the mills are to be erected, and amends the Act by substituting the Ordinary of the county where the land lies for the Justice of the Inferior Court, and limits

mount of damage done to land owners to that occasioned
ıe overflowing of water by such mill, etc. The Act
ıich this Act was amendatory, is found in Acts 1851–2,
138, and provides for the taking of such strips of land
ıy be deemed necessary for the construction and conveni-
of the railroad. It also provides for the assessment of
ges by the selection of certain appraisers in case of dis-
ment, whose award is to have the effect of a judgment,
nay be enforced by execution, with the right of appeal,

ıe parties in this case, by their plea, set up the award of
ppraisers and tender of the damages. To this plea the
tiff demurred. The Court sustained the demurrer, and
the validity of the Act of 1869 is directly brought in
ion by the pleadings and judgment. Article III., sec-
5, part 1, of our present Constitution, confers large
rs upon the General Assembly of this State; and the
ment is, that the Legislature, in the exercise of this plen-
ower, had full and unquestioned constitutional author-
pass the Act in question; and, inasmuch as the power
ant is vested with them, the right will not be abridged
ıy judicial interference.
is not our purpose to enter into any elaborate discussion
ıe constitutional questions involved, at least, not farther
to lay down the principles of law which we hold appli-
and important to the decision of the question. It is a
ine of immutable justice that cannot be controverted or
garded, that to appropriate property by legislative act,
things must occur:
rst, it must be taken for public use; and, second, it must
ken only upon just compensation, except in extraordi-
and urgent cases, arising out of the protection or safety
ıe people, which constitutes an exception to the general
This principle comes to us as an inheritance of the
mon law, and forms a part of our social polity. Outside
ıe national constitutional provision on this subject, we

find the doctrine implanted in our fundamental principles: "No person shall be deprived of property without due process of law." And when the Legislature solemnly enacts the appropriation and provides for the compensation, being the act of the law making power, it is under process of law. But the power must be exercised, by the Legislature, under the two limitations referred to. The requirement must be for public use and the compensation must be provided.

It has been argued by the distinguished counsel in this case, that the policy of the law, inferred from the omission of an inhibitory clause in the Constitution of 1868, upon this subject, is evidently to grant greater powers to the government than those heretofore conferred. We cannot consent, by inference, to the concession of any such intention by the people. Governments grow strong, generally, by encroachments upon the rights of the citizen, and the history of legislative resistance is only marked by the ineffectual struggles of minorities. And if Courts abandon the field to the unfettered license of power, then all the safeguards are swept away, and popular sentiment construes the covenants of liberty.

Who shall decide what constitutes the public use, embraces more than lies upon the surface of the question. For, while it is delegated to the law-making power to pass primarily upon the question, this delegation is not absolutely and unconditionally given, but is made subordinate to great principles of right and justice, over which the judiciary, removed from the pressure of impulsive public opinion, holds the constitutional checks so wisely and well incorporated into the contract of the government and the governed.

We recognize the right, constitutionally exercised, of the Legislature to adjudge the exigencies requiring the exercise of the power; and when the public use require it, and provision for just compensation is made or provided for, Courts will maintain the proprieties and legality of the act.

But, as arises out of the record in this case, when the Leg-

e delegates to any individual, for purposes of erecting or manufacturing establishment, at his option and in dgment, the right to take the property of another to n use, we cannot hold that such an exercise of the right ıized is constitutional. We need not go into the his- f mills and the special laws governing them. The ob- to the Act arises out of the abuse of the power in such l legislation. The power is delegated to the Legisla- n the particular case, under the constitutional require- and cannot be by them delegated to individuals to se. The power is one of eminent domain, held by the , to be used for the people; and when the Legislature s individuals with the right to assert it and take private ty for such use under it, Courts cannot recognize such as coming within the pale of constitutional authority. are not unaware of the fact that mills are in a general for the public; that their tolls are regulated by law, and nner of rotation among customers regulated. But in our n such use is not, in the contemplation of the law of ıd, such public use as authorizes the appropriation of e property, and particularly within the Act of 1851–2. ve therefore affirm the judgment of the Court below ıing the demurrer to the plea under the facts in this

gment affirmed.

C. D. ADAIR, administrator, plaintiff in error, *vs.* M. A. MCDONALD *et al.*, defendants in error.

1. Where there was a bill filed to reform a voluntary deed, on the ground of mistake, and the dispute was between those claiming under the deed, the grantor being indifferent, the rule in equity that a deed will not be reformed at the instance of mere volunteers, does not apply.
2. Under the laws of this State, Revised Code, sections 3067 and 3068, a mistake of law, as when an instrument has a different legal effect from what the parties to it intended, may be relieved against in equity, or if the mistake be in but one of the parties, if that one place great trust and confidence in the other, and that confidence be betrayed, equity will relieve against the mistake.
3. In a bill to reform a deed on the ground of mistake, when substantial justice has been done, even though the allegations in the bill may not have been precisely met by the proof, and the Court below have refused a new trial, this Court will not interfere on the ground of the variance; especially if there have been three concurrent verdicts in favor of reforming the deed.

Reforming Contracts. New Trial. Before Judge PARROTT. Murray Superior Court. May Term, 1870.

This cause was here in 1868. See *Adair, administrator, vs. Adair, administrator*, 38 *Georgia Reports*, 46, where the cause is fully reported. A new trial was granted. Another verdict was had in favor of reforming the deed, etc., and the cause came here again in 1869. See same case, 39 Georgia Reports, 75. A new trial was again awarded, and a third verdict, in favor of reforming the deed, etc., was obtained.

A motion for new trial was made upon the grounds that the verdict was unsupported by evidence, and upon various alleged errors of the Court in rejecting evidence, etc. As the opinion of the Court can be understood without these, we do not give them. The Court refused a new trial, and that is assigned as error.

W. H. DABNEY, W. AKIN, D. A. WALKER, for plaintiff in error. Evidence necessary to reform deed: Revised Code,

section 3062; 38 Ga. R., 46; 12th, 285. As to specific performance: 27 Ga. R., 275; 3 Vesey, Jr., 420; 29 Ga. R., 166; 12 Ga. R., 285–8; 16th, 61; 9, 436. Contract executed cannot be avoided for volunteer: Revised Code, section 3061, 3133; 16 Ga. R., 62; 1 Story's Eq. Juris., section 176, 433 and note 3; 2d section, 706*a*, 793*a*, 793*b*, 787, 987; 27 Ga. R., 39; 40th, 15, 16. Possession necessary to complete title: 2 Bl. Com., 195–6–9; 16 Ga. R., 62; 21st, 370.

C. D. McCutchin, R. J. McCamy, for defendants in error.

McCay, J.

1. We recognize fully the well settled rule that equity will not interfere against a grantor, in favor of a volunteer, to correct a mistake or reform a defective conveyance. The rule also extends to a bill by a volunteer, under a prior voluntary deed against a grantee, under a subsequent voluntary deed by the grantor: Code, section 3060; Story's Equity, sections 175, 180. But this rule is based upon the reasonable proposition that the volunteer has no claim on the grantor. If there is a mistake or a defect, it is a mere failure in a bounty, which, as the grantor was not bound to make, he is not bound to perfect. So in a contest between a prior and *subsequent* voluntary grantee. As the grantor was free to do as he pleased, and was not compellible to perfect his deed, he was equally at liberty to make a second deed. But here the parties claim under the *same deed*. The complainants insist that the grantor did not, in fact, *make* the deed set-up by the defendants. The grantor's interests are not at stake. He has not, say the complainants, *exercised* his free power to do as he pleased by giving this property to the defendants. His true intent is not *in* the deed, under which the defendants claim. It is the very highest equity to see to it that the real intent of the grantor shall have force. He or his representative is only a party *pro forma*, and, at best,

stands indifferent between these disputants. It is not claimed, either, that *after* a defective deed was made, he exercised his undoubted right to make another. It is a contest as to what he intended by the one deed he has made. For these reasons we do not think this case comes within the rule which denies the aid of equity to assist volunteers.

2. Equity may correct a mistake in a will, and in a will *all* are volunteers: Story's Equity, sections 179, 181. Neither the authorities, nor the principles on which this rule is founded apply to cases where the grantor is indifferent, has done nothing inconsistent with the deed proposed to be reformed, and the contest is, in fact, not between claimants under different deeds, under two independent acts of the voluntary grantor, but under the same deed. These parties are all within the scope of the grantor's intent; they all stood towards him in the same situation; they were his grand-children, and his duty to provide for one was the same duty to them all. This general principle controls most of the points of this case.

3. We are free to say that we think the complainant's case a weak one, on the testimony, and if this were the first trial, we incline to think we should send it back for a rehearing. There is but little in the testimony to justify the verdict *as found.* We think the evidence of mistake or fraud is *strong*, but it is not very clear as to what the precise intent was. That these complainants were to share in the bounty granted in the deed, is pretty clear, but it is not clear that Mrs. McDonald was not also to share. As she is not claiming either by herself or her representatives, and, as the evidence is strong that the complainants were to be the sharers, we will not disturb the finding. That three juries have, on the facts, found for the complainants, and three Judges refused new trials, indicates that the equity of the complainants is very strong; and as the failure in the proof is rather in the nature of a variance (which might have been corrected by an amendment,) than a substantial failure, we, with some hesitation,

have concluded not to interfere. It is a high prerogative for a Court to set aside the third verdict of a jury, for the plaintiffs, on the facts, and, though we do not say a case demanding such an interference cannot arise, we do not think this is such a case.

Judgment affirmed.

E. L. STROHECKER, plaintiff in error, *vs.* THE ALABAMA & CHATTANOOGA RAILROAD COMPANY, defendant in error.

Where A filed his bill against a railroad company, alleging that they were proceeding to sequester a spring of water belonging to him a quarter of a mile of the line of the road, without his consent, and had laid pipes through his land to obtain it, and were using the water, and the bill asked for injunction, etc., and on the hearing the Judge dismissed the bill for want of equity:

Held, Under the facts alleged in the bill and upon the construction of the charter of said road, the Court erred in dismissing the bill, it not appearing that the water is indispensable and cannot otherwise be obtained, and upon the view that there is, *prima facie*, a case made for equity jurisdiction entitling the complainant to a hearing.

Railroad Companies. Private Property for Public Use. Water-courses. Before Judge PARROTT. Dade Superior Court. November, 1870.

Strohecker averred that he owned certain land on which, about a quarter of a mile from the Alabama & Chattanooga Railroad, was a perennial spring, which greatly increased the value of said land, which was valuable for agricultural purposes, and especially because it was rich in iron ore; that said the said railroad company had been trespassing upon said land, laying down pipes, etc., by which to conduct the water from said spring out of its usual channel into a tank of defendant's, and were, against his remonstrances, proceeding to get a permanent right to repeat said acts, under pretence that their charter permitted them to take the

easement and have the damages therefor appraised. This right was denied, and injunction against such trespass, etc., was prayed for.

The defendants answered, that Strohecker and Nesbit, as agents for the former owners of said land, gave them certain privileges, which included taking said water, and subsequently Strohecker bought the property, knowing that, in consideration of such permission, the company had built its road, etc., on such land, so as to enhance its value, etc. Further, they said that they had a right, under their charter, to take said water, and for that purpose to enter upon said land, upon paying just compensation. They had offered just compensation, but Strohecker demanded an extortionate price, and they had appeared to have the damages assessed according to said charter. They averred that this spring was of but little use to Strohecker, because he had enough other water on his land, and of great advantage to them, because it was so situated that the tank supplied by it could not be supplied well from any other source, and said tank was necessary in the proper furnishing of said road with water. These things were set out with the reasons *in extenso*. Upon filing this answer, they also demurred to said bill for want of equity. And they moved to dismiss the bill for want of equity, or at any rate to dissolve the injunction, because the equity, if any, was sworn off by the answer.

On the hearing, Strohecker and Nesbit, by affidavits, denied the permission to use said water as alleged, and that the other streams rendered this of but little use to said land, stating the matters at large. The Chancellor dismissed the bill. That is assigned as error.

W. H. DABNEY, for plaintiff in error.

D. A. WALKER; E. D. GRAHAM, for defendant. Statutory remedy for taking private property for public use ousts equity of jurisdiction: 1. Red. on R. Ways, 296, 336; Am. R. Way Cas., 166 *et seq.*, note. Legislature determines right

of eminent domain, etc.: R. Code, secs. 2196, 2199; 29 Ga. R., 341, 344, 354–5; 2 Kent's Com., 341; 1 Redf. on R. Ways, 258. Extent of grant to take land: 1 Redf. on R. Ways, 392; 3 Zabr., (Vt. R.,) 510. Water is land: R. Code, sec. 2205.

LOCHRANE, C. J.

It appears, from the record in this case, that Strohecker filed his bill alleging his ownership of a certain spring lying some quarter of a mile from the line of defendant's road, to which they had laid down pipes for the purpose of conveying so much of the water as is needed at their tank erected at said road. He avers the spring to be of value to him in the development of iron ore, for which this land is valuable. The bill goes on to allege that this has been done without his consent, and that the defendants are about to put in new pipes, and claim the right, under their charter, to sequester the water to the use of the road, and have applied to the Ordinary of Dade county, under the provisions of their charter, to institute proceedings to assess the damage for such taking of the water and the right of way thereto.

The injunction prayed for and order of the Judge thereon elicited the answer of the defendant. But, inasmuch as the Judge below dismissed this bill for want of equity, upon demurrer, we will confine ourselves to the question raised by the bill and the rights of defendants under their charter.

The section of the charter relied on, is in these words: "When any person shall feel himself aggrieved by the said railroad being carried through his or her land, or by the use of the timber or other materials from any lands in the neighborhood of said road, or by any other works of said company, or when the said company cannot agree with any person through or on whose land the said railroad or appendages shall be constructed, or from whose lands timber or other materials shall be taken for the use of the said road," etc. Provision is then made for the ascertainment of dam-

ages, which is alleged to be, in this case, instituted by the defendant.

This charter is more liberal in its grant than ordinarily is found in the railroad corporations of this State. It contemplates more than the naked right-of-way, and it would be too narrow a view of the intention of the Legislature, expressed by the terms of this charter, so to hold. The State of Georgia has the right, for railroad purposes, to legislate wide powers to such corporations, in every way facilitating their construction and maintenance; and if water is indispensable and cannot be otherwise obtained, the sequestration of springs contiguous to the road, not at the time in use, may be within the scope and comprehension of the grant as appurtenant thereto. But, under the facts presented by the bill alone, and intimating no opinion upon the right of the party to injunction or otherwise, we think there is sufficient equity in the bill to retain it for a hearing, and let the answer and proof in the case be tried and determined.

Judgment reversed.

JOHN M. KING *et al.*, plaintiffs in error, *vs.* CALEB KING, executor, defendant in error.

Where a bill was brought by the children of Jonas King, their deceased father, to recover from the executor of their grandfather, Jonathan King their father's share being one-eighth of the estate of the said Jonathan, under the will, and the bill does not allege at what time Jonas King departed this life—whether before or after the death of the testator—and the bill was dismissed upon demurrer, for want of equity, etc.:

Held, That the averment of the time of the death of Jonas King was material, and that it ought affirmatively to appear that he died before the testator, to sustain this proceeding by the heirs as against the executor for distribution of the estate, claiming, under his will; for if Jonas died after the death of the testator, the present parties would have no right to proceed by bill for settlement, etc., against the executor, and would require administration on Jonas King's estate, and suit by such administrator to enforce such settlement.

Distribution of Estates. Equity Pleading. Before Judge ARVEY. Gordon Superior Court. October Term, 1870.

This cause is sufficiently reported in the opinion.

WRIGHT & FEATHERSTONE, for plaintiffs in error.

INDERWOOD & ROWELL, for defendant.

LOCHRANE, C. J.

This was a bill brought by the children of Jonas King, ir father, to recover from the executor of their grand-her's estate, one Jonathan King, of North Carolina, the -eighth of said estate, or share of their father, Jonas King. e bill was demurred to, and dismissed by the Judge below. In looking through this bill, we find that it is nowhere own at what time Jonas King departed this life, and this ission is important, in the opinion of this Court. If he d during the lifetime of Jonathan King, the testator, (and ich fact ought affirmatively to appear by the bill,) then, der the law, his legacy went over to his children, the pres- parties, and they would have a right to proceed against executor for their respective shares. But, otherwise, if nas King survived his father, the testator, then the present rties would have no right to proceed by bill for settlement, , against the executor of their grand-father, and this uld impose the necessity of administration on Jonas King's ate, to bring suit by such administrator, to enforce a set-ment. And upon this ground judgment is affirmed.

Nicholas *vs.* Hovenor.

M. NICHOLAS *et al.*, plaintiffs in error, *vs.* H. H. HOVENOR, guardian, defendant in error.

When an action was brought by the guardian of minors to recover a contract debt, due and dated prior to the 1st of June, 1865, and the defendant introduced evidence under the 14th section of the Act of 1870, showing losses occasioned by the war, and the Court charged, in effect, restricting the case to the provisions of that section, and the jury found the whole amount for the plaintiff, and defendant's motion for a new trial was overruled by the Court below:

Held, That the 14th section of the Act of 1870, relative to debts due widows or minors, is exceptional in the application of the general provisions of the Act, and the settlement upon principles of equity therein provided for, is controlled by the decisions of this Court; that to constitute such equity, it must appear that the losses of the defendant were, in some way, the fault of the plaintiff.

Relief Act of 1870. Before Judge PARROTT. Dade Superior Court. November Term, 1870.

Hovenor, as guardian for several minors, sued Nicholas and others upon their joint and several promissory note, dated the 4th of March, 1863, and due one day after date.

On the trial, it was admitted that the note belonged to the minors, and its consideration was shown to be on a specie basis. Nicholas proved that he lost largely by emancipation of his slaves, and other consequences of the war, but did not connect plaintiff or his wards with the losses. The other defendants were shown to have lost less.

The Court charged the jury that, they should settle this claim on principles of equity, taking into consideration the relative loss of property sustained by the plaintiff and defendants, and might find different amounts against the different defendants. He further charged that, no part of the Relief Act of 1870, but the 14th section, applied to this case, though counsel contended that the 6th and 7th sections thereof applied. The verdict was for the full amount of the note, and costs. A new trial was moved for on the grounds, that the verdict was decidedly against the weight of the evidence, and against the first clause of the charge, and that the last

clause was wrong. The motion was overruled. That is assigned as error.

R. H. TATUM; D. A. WALKER, for plaintiffs in error. Act must be plainly unconstitutional before declared void: 37 Ga. R., 168, 171, 173; Cooly's C. Lim., 182, 184, 185; Sedg. Con. L., 482; 38 Ga. R., 350–355. Georgia quit the Union: 39 Ga. R., 285, 306, 308. Congress took us back, Relief Law and all: 11 How. R., 185; 39 Ga. R., 298, 300. Legislature controls remedies: Cooly's Con. Lim., 92. Unless Act violates *words* of Constitution, it is valid: Cooly's Con. Lim., 87, 90, 168, 172, 174; Sedg. Con. L., 180–183–7; Constitution 1868, Art. III., sec. 5; 5 Ga. R., 194, 201; 8 Ga. R., Beall vs. Beall. Review former decisions of this Court on Stay-laws, *et id omne genus.*

E. D. GRAHAM; W. H. DABNEY, for defendant.

LOCHRANE, C. J.

This was an action brought by Hovenor, as guardian, against Nicholas and others, for the recovery of money due on a note given in renewal of a contract before June, 1865. Upon the trial of the case, the defendants pleaded the Relief Act of 1870, and introduced evidence of losses arising out of the consequence of the war. The jury found for the plaintiffs, and a motion was made for a new trial, which the Court overruled; and this constitutes the exception of error now before us.

Our brother Walker, who argued the case so ably before us for the plaintiff in error, took a wide field of discussion from the Act of Secession, the war, the legislative and judicial action on the question popularly known as relief, covering in his review the Scaling Ordinance of 1865, and the decisions of this Court in *Cutts vs. Hardee; Battle vs. Shivers; Chapman vs. Akin; Shorter vs. Cobb; Hardeman vs. Downer;* and *Bonner vs. Martin;* the Relief Act of 1868, and legislative resolution, and, finally, the Act of 1870.

We have not time, nor do we hold it to be necessary in this case, in the view we entertain of the character and effect of the fourteenth section of the Act of 1870, excepting from the general operations of that Act, debts due widows and minors, to enter into any elaborate disquisition of the constitutional right of the Legislature to pass such Acts as are now before us; but confine ourselves to the judicial construction and effect of the section recited in its application to the case at bar.

Whether the State, in fact, seceded from the Federal union, and was out, and was brought back as a conquered territory, and her people at the mercy of the conquerors, is not material to our present consideration of the case at bar. A majority of this Court have so held, arriving at the conclusion from different standpoints, by different process of ratiocination. For myself, it would contribute but little to the general information on this subject to express individual views. My own opinion is, that the State tried to secede and failed. In this effort, she defied the powers of the government of the United States to exercise their municipal sovereignty or laws over her, for over four years, and with historic heroism, maintained a government and laws of her own choice, by armies in the field. But in the final failure of her arms, the National government spread over the State the shadow of its flag and symbols of its power, Georgia was conquered in a military view, but restored in a civil. The constitutional compact, at first a compact of compromises and concessions, was re-written by a mailed hand; and the legislation which has kept the State from the exercises of her privileges is not a constitutional argument that they do not exist.

But the legal effect of this argument is, that, being out when the Constitution of 1868 was adopted, we were moulded out of original elements, and our new-born organization placed us without a history in the past that bound us to the constitutional restrictions of the United States. In a word, old things had passed away, and just as Congress received us, with

our new constitutional provision, we stand to-day; and, inasmuch as the right had been given to our Legislature by our people (thus originally convened,) to pass these Acts, that right now exists in *propria vigore* and cannot be limited by judicial power within the legitimate scope of its exercise.

Out of this argument arises another, that, inasmuch as the Legislature have passed an Act making losses by the war a set-off to contract debts, that Act is within the power delegated to the people, without limitation by the Legislature; and this Court usurps the prerogatives of the Legislature, in assuming to repeal its provisions by declaring them inoperative.

The Legislature has declared these losses as set-off "lawful." The people have clothed the Legislature with all power, except where they have made limitations; there being no limitation or restriction in this regard, the exercise of the power is constitutionally discharged.

In construing the National constitution, the rule changes. Here all power not limited may be exercised by the Legislature. The sequence is, that Courts cannot declare Acts unconstitutional except in violation of the express words of the constitution. Contrary to the spirit or concealed intention, is not sufficient to invoke the judicial interference; for this would be the substitution of the judgment of the Court for the will of the Legislature.

The Act of 1870, is contrary to no express words and therefore as invoked in this case, will be sustained by the Court—the argument, in substance, being that the right of the plaintiff is not touched by the law, but only another right given to the defendant, growing out of the facts originally either at the time of the contract, or since.

When these questions on the constitutionality of the Act of 1870, come before us we will adjudge the case. In the present instance we will construe one section, and that an exceptional section in the Act. "Nothing in these Acts shall be so construed as to affect any claim due any widow or mi-

nor, contracted prior to June 1st, 1865, but such claims shall be settled upon the principles of equity, taking into consideration the relative loss of property sustained by the plaintiff and defendant."

In the opinion of this Court, the equity principles laid down for the settlement of such debts is controlled by the adjudication of this Court to the effect. "To sustain a plea under the Relief Act of 1868, it must appear that the loss which defendant claims as an equitable ground for reducing the plaintiff's claim was in some way the fault of the plaintiff."

The section under consideration lays down no new rule conflicting with the decision of this Court. Cases of widows and minors are to be settled upon principles of equity. This Court has decided what are the principles of equity. There must be some act, promise or consequence of loss originating in the fault of the plaintiff to constitute an equity.

And with this construction of the fourteenth section, we affirm the judgment of the Court below.

WILLIAM R. PHILLIPS, plaintiff in error, *vs.* WILLIAM SOLOMON, defendant in error.

(This cause is reported *ante* page 192. This concurring opinion below was left out by oversight. REPORTER.)

WARNER, J., concurring.

This was an action brought by the plaintiff against the defendants on a promissory note, dated 22d May, 1866, payable to the plaintiff six months after date. Solomon, one of the defendants, pleaded that he signed the note as surety, that Morrison, the principal debtor, had been discharged as a bankrupt from the payment of the debt under the provisions

of the Bankrupt Law of Congress, passed the 2d March, 1867. The plaintiff demurred to the defendant's plea, which was overruled by the Court, and the plaintiff excepted.

The sole question for our decision and judgment in this case is, whether the discharge of the principal debtor, under the provisions of the Bankrupt Law of Congress, also discharges the surety to the note. By the 8th section of the I. Article of the Constitution of the United States, Congress has the power to establish *uniform laws* on the subject of bankruptures *throughout the United States.* The XI. Article of the Constitution of 1868, of this State, declares as *the supreme law,* the Constitution of the United States, and *the laws of the United States,* in pursuance thereof. The 33d section of the Bankrupt Law of the United States, declares that no discharge granted to the bankrupt under that law, "shall release, discharge, or affect any person liable for the same debt, for or with the bankrupt, either as partner, joint contractor, endorser, *surety,* or otherwise." Morrison, the principal debtor, has been discharged from the payment of the debt under the provisions of this Bankrupt Law, which, under the Constitution, is to have a *uniform* operation throughout the United States; and Solomon, the surety, claims to be discharged from the payment of that debt because the principal debtor has been discharged, notwithstanding that same Bankrupt Law which discharged the principal debtor expressly declares that no discharge granted to the principal debtor shall release, discharge, or affect any person liable for the same debt, for or with the principal bankrupt debtor, either as partner, joint contractor, indorser, *surety,* or otherwise. But it is said the 2121st section of the Code of this State declares, that "the obligation of the surety is accessory to that of his principal, and if the latter, from any *cause,* becomes extinct, the former ceases, of course, even though it be in judgment;" and that the parties contracted in view of this local law of the State. This general declaration of the Code does nothing more than to announce the

general law applicable to principal and surety, and does not include that class of cases where the principal debtor is discharged by *operation of law;* the more especially when that law which discharges the principal debtor expressly declares that it shall not operate to discharge the surety. But if the State law had expressly declared that the discharge of the principal debtor in bankruptcy should have the effect to discharge the surety, the State law upon that subject, being in conflict with the general Bankrupt Law of the United States, the former must yield to the latter as the paramount law of the land, it being a law in pursuance of the Constitution of the United States, to establish a *uniform* law of bankruptcy throughout the same, and it cannot operate *uniformly* throughout the United States if the surety of the principal bankrupt debtor can be released and discharged in Georgia, and held liable for the debt in New York, or in any other of the United States. In the case of *King vs. The Central Bank*, 6 Georgia Reports, 257, this Court held, that it was not a valid defense for an indorser, that the maker of the note had been discharged under the provisions of the Bankrupt Law of 1842.

Dabney *vs.* Bailey.

'ILLIAM H. DABNEY, administrator, plaintiff in error, *vs.* AMELIA A. BAILEY, defendant in error.

here a widow, with the assent of the administrator and the approval of the Ordinary, elected to take money in lieu of dower, and commissioners were appointed to assess the same, who made a return of their action, but the widow recalled her election and the Court passed an order setting aside the return, and permitting her to recall her election, and afterward commissioners were appointed in the ordinary way to assign to her dower, and they made a return of the assignment:
eld, That, in a traverse of the return by a creditor, the former proceedings, in relation to her choice of money in lieu of dower, were no bar to her present application; it appearing that she made her election of money under the impression that the estate was fully solvent, when, in fact, its solvency is doubtful.

Dower. Election. Estoppel. Before Judge HARVEY. ordon Superior Court. October, 1870.

Mrs. Bailey, supposing her late husband's estate solvent, ected to take a sum of money, absolutely, in lieu of dower. he Superior Court appointed commissioners to fix the mount, and they made their return to the succeeding term f the Court. Nothing was done at that term. By the ext term it was ascertained that the estate was probably in-lvent, and her attorney took an order withdrawing said pplication for said reason. Subsequently, she applied for ower. The administrator and a creditor pleaded said rmer election as above. At the hearing she swore to her aid reasons for her action, and that no third party had so cted upon her election as to be prejudiced thereby. The ourt allowed her dower assigned, and that is assigned as rror.

WILLIAM H. DABNEY, for plaintiff in error.

W. T. WOFFORD, for defendant. The *judgment* of the uperior Court concludes the parties: R. Code, sec. 3976. he had right to abandon the election to take dower: R. ode, section 1756.

McCay, J.

Although there are several assignments of error in this record, yet at the hearing but one was insisted upon, to-wit: that the applicant for dower was estopped by her election to take money in lieu of dower.

The Code, section 1760 and 1761, providing for this election, does not fix any period in the progress of the proceedings when the election shall be complete. It is invalid until the executor or administrator and Ordinary assent. This Court, in *Smith vs. Smith*, 36 Georgia Reports, 620, has decided that, as a general rule, the assent of the Ordinary ought to be before the commissioners have made the assessment. We are inclined to think that the election is complete when all the parties upon whose will it depends have agreed to it; though much might be said in favor of the widow having a right, at her option, to withdraw her election at any time before the judgment of the Court. We can see no objection, however, to putting her upon the same terms as is provided for her choice of a child's part in lieu of dower: Revised Code, section 1756. If she elect in ignorance of the condition of the estate, or of any fact material to her interest, she is not barred unless her change of purpose will injure persons who have, *bona fide*, acted on her election.

At the time this election was made the estate was supposed to be perfectly solvent, with a handsome surplus to the heir. It is now discovered that it is probably insolvent, and that the widow will have to support and educate her child out of her own means.

Whilst the estate was such as to give the child a handsome portion, the mother might be very unwilling to hamper the *corpus* of it with her dower in kind. She might be very careless about her dower at all. Her share of the personalty might satisfy her, sure of a home as she was with her child. But in the new phase of things—the homestead gone—the child dependent upon her, we can see strong reasons why she

should prefer her dower in kind. The preservation of the homestead in the family is of itself a strong inducement. Besides, nobody is hurt. There is no pretence that any one has acted upon her election, so as to make this change of purpose upon her part a wrong. Her election may, we think, fairly be said to have been made in ignorance of the condition of the estate, since the new state of things casts new duties upon her. We would not hold a woman to a very strict rule upon this subject. They are generally ignorant of business, ready to sacrifice themselves for their children, and to be governed by considerations far less selfish than those which control the other sex.

We do not, upon the whole, see any error in this record, and we affirm the judgment of the Court below.

Judgment affirmed.

MORGAN KEMP, administrator, plaintiff in error, *vs.* CYNTHIA KEMP, *et al.*, defendants in error.

MARY A. GRIFFIN, guardian, plaintiff in error, *vs.* THOMAS GRIFFIN, administrator, defendant in error.

Under the Constitution of 1868 and the Acts passed to carry the homestead clause therein into effect, neither the widow nor minor heirs of a deceased person have any right of homestead in the property of the deceased, as against the claims of the adult heirs to their distributive share under the statute of distributions.

Homestead. Before Judges HARVEY and JOHNSON, Marion and Paulding Superior Courts, 1870.

On the 5th of September, 1866, Ezekiel Griffin, of said county, died intestate, leaving as his heirs at law, Mary Ann Griffin, his wife, and other named children and grand-children who were adults, and four children by said wife, who

were minors, Thomas Griffin, one of the adult sons, obtained letters of administration upon his father's estate on the 13th of October, 1866, and on the 5th of November, 1866, Mrs. Griffin had obtained letters of guardianship for said minors. Part of the property of which intestate died seized, were lots numbers one hundred and seventy-four, one hundred and seventy-six, one hundred and eighty-five, one hundred and eighty-six, one hundred and eighty-seven, two hundred and forty-six, two hundred and forty-seven, two hundred and forty-eight and two hundred and fifty-eight, in the second district of the third section of what is now Paulding county. Numbers two hundred and forty-seven and two hundred and forty-eight, the east half of number two hundred and forty-six, and the east half of number one hundred and eighty-seven, and the north half of number two hundred and forty-eight of said lands were assigned to said widower as her dower.

Afterwards, in January, 1869, the widow, as guardian of said minor children, applied to the Ordinary of said county to have a homestead for the use of said family of minor children, laid off out of the lands of said intestate. In due form of law a homestead was laid off for the use of said family of minors, consisting of said lots, numbers one hundred and seventy-four, one hundred and seventy-five, one hundred and seventy-six, one hundred and eighty-five, one hundred and eighty-six, the west half of number one hundred and eighty-seven, and the west half of number two hundred and forty-six. After this homestead was laid off and approved by the Court, according to law, the administrator advertized said lands for sale, under an order for leave to sell it, which order had been granted before said homestead had been applied for. Mrs. Griffin, as such guardian, filed her claim to said homestead lands, and said claim stood for trial in said Court.

Upon this state of facts, agreed upon, counsel for the administrator and guardian submitted to the Court whether said homestead lands could be sold by the administrator, un-

der the Constitution and laws of this State, and agreed to take a verdict according to the decision of Judge Harvey upon said question. After argument had, the Judge held that the adult heirs had an interest in said homestead lands of which the assignment of such homestead could not deprive said adults, and that the administrator could lawfully sell said homestead lands. Accordingly the jury found the homestead subject to be sold by said administrator. The guardian, by her counsel, says that the decision of the Judge was wrong, and, consequently, the verdict was without evidence, and prays a reversal of said decision.

GEORGE N. LESTER, for plaintiff in error. Homstead: Constitution 1868, Article 7, section 1; 40 Ga. R., 441 and Homestead Act. Distribution of estates: Revised Code, sections 2530, 2533. Vested rights: 39 Ga. R., 425, 285, 306.

JOHN O. GARTRELL, for defendant. On death, title to lands vests in heirs: Revised Code, sections 2220, 2447. Retrospective laws: T. U. P. Charlton's R., 194; R. M. Charlton's R., 324; 23 Ga. R., 407.

Kemp vs. Kemp *et al.*, was this: Morgan Kemp, as administrator of John Kemp, was about to sell certain land of said John Kemp, when the sale was arrested by a claim, by the widow and others. At the trial, he showed that he was, as administrator, authorized by the Ordinary to sell said land; that John Kemp died seized and possessed thereof, on the 16th of April, 1866; that his heirs were his widow, now dead, Cynthia L. Kemp, and three minor heirs of his dead son; he owed nothing, and said sale was for distribution. Claimants read in evidence, over plaintiff's objection, an exemplification from the Court of Ordinary, showing that, in December, 1868, this land had been assigned to the widow as a homestead.

The Court charged the jury that, if said property was

John Kemp's at his death, and had been assigned, as a homestead, to his widow, his title was thereby divested, and the title was in the widow and her children, and they should find for the claimants. That is assigned as error.

BLANDFORD & THORNTON, for plaintiff in error.

No appearance for defendants.

McCAY, J.

The same question is involved in both these cases; that is, whether the homestead clause of the Constitution of 1868, and the Act of 1868, to carry the same into effect, so changes the statute of distributions as to give to the widow and minor children of a deceased person a homestead and exemption in his property, as against the claims of the other heirs-at-law to ther distributive shares.

There is *nothing* in the Constitution to justify such an inference. The whole tenor of the language is to make a provision, for the wife and children, against the claims of creditors. The language used is: "No Court shall have jurisdiction to enforce any *judgment, decree,* or *execution against the same.*" Constitution, Article VII., section 1. Necessarily, this must mean judgments for *debts*, and not judgments upon questions of title; since, to hold otherwise, would be to make the laying off of a homestead a judgment *in rem* against the world, as to the title of the property, and binding upon all claimants.

At the death of any one, intestate, the title to his real estate passes to his heirs-at-law, according to the Statute of Distributions. Is there anything in the Homestead Laws which looks to divesting titles—which authorizes any one to take a homestead in land belonging to another, to which another has title?

A creditor, even a judgment creditor, has no *title* to the property of his debtor. In this State, it is true, a *judgment* creditor has a lien upon the property; but the title is in the

debtor. He may sell it, give it away, dispose of it as he pleases—the *title* is a good one. Our law simply follows the property with the lien, and the discharge of that, at any time, relieves the new title of the burden. If the property be carried out of the *State* and sold, the *lien* even does not follow it. Before judgment the creditor has no interest at all. The debtor may sell it, waste it, destroy it, spend it, burden it as he pleases, and the creditor is powerless. But none of these difficulties attach to one who has the title. The property is his. And just here is the point of these cases.

In a solvent estate, the law casts the title, without burden, upon the heirs-at-law, according to the Statute of Distributions. The share of the adult heir is just as truly and emphatically his, as is the share of the minor or the widow theirs; and there is nothing in the Homestead Laws to authorize any divesting of a title. If the homestead be laid off before the death of the intestate, the title, by the statute, rests, and never passes to the heirs. But, at the death, the whole real estate passes to the heirs. If the title passes from the husband during his life, before the homestead is laid off, the right to homestead is gone, because the title is gone. So, at the death, the title having passed to the heirs, the homestead is gone.

If the estate is insolvent, then, as against the claims of the *creditors*, the law declares the homestead to exist. The heirs generally have, it is true, the *formal title*, but in their hands it is subject to the debts, and is worthless to them. The assertion of the homestead is no wrong to them, because they really would get nothing. The dispute is, then, between those who have claims upon the estate, creditors, and the wife and minors. For all practical purposes, the title is in the administrator. Indeed, under the Code, he may sue and recover from even the heirs; and the want of title in the property out of which the homestead is taken does not exist: Code, section 2450.

As to the question of equity, that is not for the Courts. There is often an equity in giving to the wife and minors a preference over the adult heirs. But if the Legislature see fit to so alter the Statute of Distributions, they can, in a very few words, so declare. There is no necessity for the machinery of a homestead. A simple provision declaring that, in the distribution of intestates' estates, the wife or minor children shall have such and such an amount or share more than others, is sufficient, and the administrator will so distribute it. It will be found, however, that sometimes such a rule will be very unfair. In one of the cases at bar, such a rule would take the share of the minor children of a deceased son of the intestate.

We are clear that it was not the intent of the Constitution to interfere with the distribution of intestates' estates among the heirs-at-law, and we reverse the ruling of the Court in the case of Kemp *vs.* Kemp, and affirm it in the case of Griffin *vs.* Griffin.

F. T. SELF, plaintiff in error, *vs.* DUNN & BROWN, defendants in error.

One who keeps a ferry for his own use and for the convenience of customers to his mill, but who charges no ferriage, is not a common-carrier, and is only bound to ordinary diligence.

Carriers. Common-Carriers. Before Judge PARROTT. Catoosa Superior Court. September, 1870.

Dunn & Brown had a mill, and to make it more accessible, had a flat for their customers to go to it across the pond. Self went there, procured his load, and, when re-entering the ferry to return, the flat got loose, while his mules were on it and his wagon on land, and the mules were drowned. He

sued Dunn & Brown as carriers for hire, averring the hire to be the custom obtained by the ferry. The evidence important for our purpose showed the following facts: The ferry was not chartered, but private; no toll was charged upon it, but it did increase the custom of the mill, by rendering the mill more accessible to certain customers. Defendant's counsel requested the Court to charge that, "if this was a private ferry, built by defendants for the accommodation of themselves and a portion of their customers, to the mill, and defendants did not charge toll or compensation for putting persons over on said flat, and charged plaintiff nothing for carrying him over, defendants are not bound to the diligence of a common-carrier, nor of a carrier for hire, but were only bound to use slight care, and liable for gross neglect."

The Court refused so to charge, but charged: "If defendants established their ferry for the accommodation of their customers, and thereby persons were induced to go to their mills, they were common-carriers for such persons, and if plaintiff was their customer, they were bound to extraordinary diligence, and liable for any loss accruing to their customers, without fault of the customers. Ferrymen are common-carriers. Common-carriers are bound to extraordinary diligence. If the ferry was a gratuity; that, is by it, no benefit accrued to defendants, no custom was brought to their mill, they would not be common-carriers, and would be bound to only ordinary diligence," and *vice versa.*

The jury found for the plaintiff. A new trial, upon the grounds, that the Court erred in not charging as requested, and in charging as he did, etc., was granted. That is assigned as error.

A. T. HACKETT; W. H. DABNEY, for plaintiff in error. Ferryman bound for neglect, etc.: R. Code, sec. 750. Private ferryman *may* be common-carrier: Ang. on L. of Car., marg. p., 82, sec. 734. What is hire: Story on Bailm., 469 and note, 495 and note; Ang. on L. of Car., 113, note 1.

McCutchen & Shumate, for defendants. Who is a common-carrier: Story on Bailm., sec. 495; Ang. on Carriers, sec. 68; R. Code, secs. 2039, 2040. When ferryman is common-carrier: Ang. on Car., sec. 82. Private carriers: Ang. on Car., secs. 123, 124; Story on Bailm., sec. 508; R. Code, sec. 2043.

McCay, J.

As a general rule, a ferryman is a carrier, and, under certain circumstances, he is a common-carrier: Angell on Carriers, section 82. But a carrier is one who transports goods *for hire*: Revised Code, section 2039. A common-carrier is one who pursues the business constantly or continuously, for any period of time or any distance of transportation: Code, section 2040. One who "pursues the business." What business? The business of carrying goods *for hire*. A carrier is bound to ordinary diligence. A common-carrier can give no excuse for loss or damage but the act of God and the enemies of the State, and even then he must use extraordinary diligence: Revised Code, sections 2039, 2040. And this is but a restatement of the common law, by Jones, Story, Angell and other writers upon the subject. To make one a common-carrier, he must be entitled, either by the bargain or by implication, to toll or hire.

This whole question, in a case very like this, in all its details, was before the Supreme Court of South Carolina, in the case of Littlejohn vs. Jones, 2 McMullin's Reports, 366. That was a case of a ferry—a private ferry—used like this, as an appendage to a mill. There, however, it often happened that persons, other than customers to the mill, passed and paid ferriage; but it was understood that the payment was optional, and went to the servant, the main purpose of the ferry being to pass the customers to the mill. The Court held, in that case, that the mere fact that persons paid was not sufficient; the circumstances must be such, as that there

s either an express or an implied promise to pay. The use f it, as an appendage to the mill, did not alter the case.

The ferryman, in this case, was a mere *mandatary*, a bailee, ot for hire, and is only liable for gross negligence: Revised Code, 2078. This was not even a chartered ferry, but a simple accommodation of the mill-owner to his customers. It is very subtle reasoning to say that the increased custom to his mill was his compensation. But one rarely does any act of favor to others that does not, at length, repay him. Is it fair to call that hire? We have given a good deal of search to find a case where such incidental benefits, coming to a mandatary, have been held to change his character and make him a bailee for hire, but have found none.

We think the charge was wrong on this point. The defendant was only liable for gross neglect, unless he was in the habit of charging toll: Revised Code, section 734.

Judgment reversed.

MARGARET E. FISCHESSER, plaintiff in error, *vs.* THOMAS J. HEARD, defendant in error.

If the owner of a specific sum of money loan it to another, for a special purpose, as that the borrower shall pledge it to secure his forthcoming to answer on a bail bond, and the pledge is accordingly made:

Held, That when the bond is complied with, the original lender and true owner of the money may maintain assumpsit against the pledge for the rocovery of the money.

Contracts. Money had and received. Before Judge ANDREWS. Elbert Superior Court. May, 1870.

The petition of Margaret E. Fischesser, widow of J. B. Fischesser, against Heard, made this case. Heard, on the 6th of January, 1867, in writing acknowledged the receipt f $500 00 (which was in gold) as collateral security, to in-

demnify Heard against loss by standing J. B. Fischesser's security on a bail-bond, (described) which money said Mrs. Fischesser avers is hers individually. Heard has been duly discharged from said bail-bond, and yet refuses to pay said $500 00 to plaintiff on demand made before suit.

In another count she averred that Heard had $500 00 which she claims as her own, and yet, though she has demanded it from him, he refuses to pay her that sum and interest. Defendant's attorney demurred to said petition, and the demurrer was sustained, although plaintiff's counsel moved to amend. The Court held that no amendment would authorize a recovery in assumpit for money had and received, so long as it was averred that Heard received the money from J. B. Fischesser, and that he made no contract with plaintiff because there was no privity between her and Heard. This ruling is assigned as error.

J. D. MATTHEWS, for plaintiff in error. The facts averred make a pledge: Story on Bailment, sections 286, 290; Bouv's L. Dic., "Pledge." Property pledged without consent of owner may be reclaimed by owner: Ib., sections 291, 340; Story on Con., section 718; 13 Mass. R., 105; 5 Taunt, 759. When bail-bond extinct plaintiff could recover: Story on Bailment, sections 295, 291, 102; 5 Taunt, 759. Plaintiff's recovery will protect defendant against her husband's administrator: Authorities just cited. Form of remedy not material: Revised Code, section 3256; 21 Ga. R., 548. Second count good: Revised Code, sections 3256, 3314. Defendant after demand converted the gold: 1st Ch. Pl., 157–8, 147–8. Tort waived, assumpsit lies: 1st Ch. Pl., 100; 21 Ga. R., 526, 546–7–8. Privity implied if averments are true: 2 Gr. Ev., 102; 1st Kelley, 140, 141, 152.

TOOMBS & DUBOSE, for defendant in error.

McCAY, J.

We do not see why the second count in this declaration is not good as it stands. It sets forth that the defendant is in possession of $500 00 in gold, belonging to plaintiff, which he refuses to pay. Will not the law, on this state of facts, imply a promise? But, in our judgment, the first count is good, with but a slight amendment. It is not clearly stated that the plaintiff was the owner of the money at the time of the pledge, or that it was intrusted to J. B. Fischesser for this special purpose. If the count were amended so as to state this, we think it would be good.

Property may be lent for a special purpose, and if so, it can only be used for that purpose: Revised Code, section 2108. If this were a horse, or personal property, other than money, there would be no trouble, since it is a settled rule that the true owner may pursue his property, or its value, into whosever hands it may come. If the money did not belong to J. B. Fischesser—if he held it, either tortiously or as bailee for a special purpose, and has deposited it with the defendant, in accordance with that purpose, in either case the true owner has a right to recover it.

If Fischesser was a tortious holder, clearly the right of the true owner to recover exists. If he was a bailee, and has tortiously deposited it with the defendant, the same right exists. Can it make any difference that the deposit was with the consent of the true owner, or that the true owner has ratified the act of the depositor? We think not. As this is money, if Heard received it without notice of the want of title in J. B. Fischesser, he would have a right to retain it so long as he was liable, under the bond: Revised Code, section 2595. But Heard has *no* rights, now, to the money, because he is discharged from the bond.

As a matter of course, if this was a general loan by the plaintiff to J. B. Fischesser, her rights are gone; she is only a creditor, and the title to the money was in J. B. Fischesser.

Our judgment is put on the ground that it may be alleged and proven that the money was bound to be pledged in this way, and for this special purpose. If this be so, we hold that, when the purpose has been fulfilled, the true owner has a right to recover. Or if Mrs. Fischesser, being the true owner, J. B. Fischesser, without any authority, took the money and made this pledge, even then, under the state of facts as set forth, to-wit: that the object of the pledge has been fulfilled, the true owner may assert her rights.

As the thing pledged is money, it passed to the pledgee, even without authority from the owner, and he had a right to retain it so long as he was liable on the bond, but when the bond was complied with, he stood in no better position than J. B. Fischesser did.

Judgment reversed.

A. H. KETCHUM, plaintiff in error, *vs.* D. B. VERDELL, defendant in error.

An action was brought by K. against V. to recover the value of one hundred bushels of corn, and on the trial it was proved that, in the latter part of the year 1866, V., who resided in Elbert county, wrote to Tate, in the city of Augusta, one of the firm of McCalla, Tate & Company, who were engaged in the produce and commission business, "to send me (him) two hundred bushels of corn, and when I come down you and I will arrange, or settle it." It appears from the evidence in the record, that Tate, or the firm of which he was a partner, did not have the corn, but Tate went to the house of the plaintiff and made an arrangement with him to send V. one hundred bushels of corn on V.'s credit, which was done, and the corn was charged to V. on the books of plaintiff. The corn was sent to V. by boat, and accompanying the corn was a bill made out against V., the defendant, therefor, in favor of McCalla, Tate & Company, which was delivered to him when he received the corn. It also appears that the plaintiff had sued McCalla, Tate & Company for the corn, and failed to recover, but on what ground, the record does not show. The plaintiff then sued defendant, V., for the corn. On the trial, several witnesses were examined, and

it was proved to be the custom of commission merchants, when orders were received from customers, to go to merchants and purchase the articles ordered, and have the same charged to the commission merchant, and the commission merchant charged the articles to the party ordering. The Court charged the jury that it was *doubtful* whether the order of the defendant made Tate his agent to purchase the corn.

Held, That under the order sent by defendant to Tate, he had the authority to purchase the corn, and to charge the defendant with the price thereof, and make the defendant *his* debtor therefor, but did not have the authority to authorize the plaintiff to sell the defendant corn, and thereby make the defendant *the plaintiff's debtor* for the corn. If the defendant received the corn and used it, with a full knowledge of all the facts, that would have been a ratification of the transaction, and the defendant would be liable to pay the plaintiff for the corn.

Held, again, That the bill for the corn, accompanying the shipment thereof, was properly admitted in evidence on the trial.

Held, also, That it was error in the Court, in its charge to the jury, to express or intimate its opinion as to the evidence in the case, under the provisions of the 3183d section of the Code, and in not charging the jury as to the ratification by defendant of the sale of the corn by plaintiff to defendant on his credit, under the evidence contained in the record.

Assumpsit. Agency. Before Judge ANDREWS. Elbert Superior Court. September Term, 1869.

Ketchum sued Verdell for the value of certain corn and sacks shipped to him in December, 1866. The only dispute was as to whether Verdell owed Ketchum. The evidence was, that Verdell wrote to Tate, one of the firm of Tate, McCalla & Company, commission and produce merchants, 'Please send me two hundred bushels of corn, and when I come down you and I will arrange, or settle it." Tate, McCalla & Company did not have the corn, and Tate went into Ketchum's, next door, to get it. Upon his statement that Verdell was responsible, Ketchum agreed to send the corn. He put it up in sacks, marked, "From A. H. Ketchum, Augusta, Ga.," and shipped it. With the corn was forwarded a bill in favor of Tate, McCalla & Company, against the defendant, on which was a request for immediate return of the sacks. Who made out and forwarded this bill did

not appear, but it was shown that Tate requested Ketchum to send in his bill to Tate's firm. On Ketchum's books the corn was charged to Verdell. The sacks were returned to Ketchum, but whether by Verdell or through Tate or his firm, did not appear. When the money was due, Ketchum wrote Verdell for the same, but he did not pay it. He called on Tate, McCalla & Company, to know if Verdell had sent the money, and finally asked the firm to pay, but McCalla said the firm was not liable for the corn. Ketchum sued Tate for it, but, for some reason not disclosed, he did not recover. He then sued Verdell. It was shown that commission merchants frequently bought goods for and on account of their country customers; that, if they were selling the farmer's produce, the commission merchants generally paid out of its proceeds for purchases made on account of the farmer; that the custom was, for the goods so bought to be charged to the purchaser, who charged them to the person ordering the goods, unless the solvency of the customer was doubtful, then a special contract was made. The clerk of Ketchum testified that the negotiation was between Tate and himself, that he would not have credited Tate, nor would credit Verdell till he learned he was good. Nothing else pertinent appeared. The Court charged the jury as shown in the motion for a new trial, and the jury found for the defendant.

Ketchum moved for a new trial, because the verdict was strongly and decidedly against the weight of the evidence and the law, and because the Court erred in charging the jury that the fact that the sacks were marked "from A. H. Ketchum, Augusta, Ga.," was not necessarily conclusive evidence that the corn belonged to or was shipped by Ketchum; that it was doubtful whether said order made Tate Verdell's agent to buy the corn, or whether, under the evidence, Tate was Verdell's agent for that purpose; and last, because the Court erred in admitting in evidence the account made out in favor of Tate, McCalla & Company against Verdell. The

refusal of a new trial is assigned as error, on each of said grounds.

J. D. MATTHEWS; H. A. ROEBUCK, for plaintiff in error, cited: Story on Con., 138; 1 Parsons on C., 43; 4 Wash. C. C. R., 551; 2d, 132; R. Code, secs. 2158, 2170; 10 Wend. R., 218; 6 Serg. & R., 146; Brightly's F. Dig., 39; 8 How. R., 408. As to construction of the letter.

TOOMBS & DUBOSE, for defendant.

WARNER, J.

The charge of the Court to the jury, "That it was *doubtful* whether the order of the defendant made Tate his agent to purchase the corn," was error, under the provisions of the 3183d section of the Code. According to the evidence in the case, as disclosed by the record, the Court should have charged the jury as to the ratification, by defendant, of the sale of the corn, by plaintiff to the defendant.

Let the judgment of the Court below be reversed.

LOCHRANE, C. J., concurred, he said, for different reasons, but furnished no opinion.

MCCAY, J., concurring.

I am inclined to the opinion that the plaintiff is entitled to recover on the *contract*. The order is to be construed in the light of the known *status* of the parties, and it being, not a regular and deliberate power-of-attorney, but a mere letter, is to be freely construed: Story on Contracts, section 138. So, also, if it be not clear upon its face, but susceptible of two constructions and is acted upon, the rule is, that parties having, in good faith, been misled by the letter, will be protected: Story on Contracts, section 138; 4 Washington's Circuit Court Reports, 551; 2 Washington, 132.

Very clearly, from the proof, Tate acted under the impres-

sion that he had a right, under the order, to buy of the plaintiff on the defendant's credit, and, under these rules, the contract would be good. But this is an action, not on the contract, but for the value of the corn. Admit that Tate had no authority to buy on the defendant's credit, it is clear that he *did* so buy, and that plaintiff parted with his corn on the faith of Tate's representations. Suppose Tate had stolen the corn and sold it to the defendant, could not the plaintiff recover of the defendant its value, if he applied it to his own use?

As the facts here appear, this corn was *never* Tate's corn, nor that of the firm of which he was a member. Could he or the firm give the defendant any better title to it than they had themselves? Revised Code, section 2595. At the most it would be a title obtained by fraud, and voidable: Revised Code, section 2596. It is true, in cases under this last section, a *bona fide* purchaser, without notice, will be protected. But as the record discloses in this case, the defendant does not stand in that condition, because he had not yet paid the price of the corn to anybody. He cannot be hurt by having to pay the true owner, since he has not paid anybody, or by reason of his receipt of the corn from Tate, giving Tate credit

It seems to me monstrous, that defendant shall get plaintiff's corn and use it, and both Tate and his partner repudiating any right to recover, that plaintiff shall be turned off on a mere technicality. The general rule, as I understand it, is that when one professes to act as agent of another, even if he has no authority at all, and as such agent obtains goods which, in fact, go to the use and benefit of the principal, the seller may, at any time before the principal has settled with the pretended agent, notify the principal of the truth of the case and demand payment: *Central Bank vs. Merchants Bank of Macon*, 1 Kelly's Reports, and cases there cited. If the principal accepts the property, knowing all the facts, that is a ratification of the *agency;* but even if he knows

nothing of the facts, but accepts the property as sold him by *the agent*, yet if the agent was not in fact the true owner, and the seller so notifies the purchaser *before any settlement*, the right of action in the seller exists.

JOHN S. POOLE, plaintiff in error, *vs.* JOSEPH W. WILKINSON, defendant in error.

Where there was a suit pending in a Justice's Court, and the defendant moved to continue, on account of the absence of a witness, the payee of the note, by whom he could prove that the note was given in liquidation of a debt due to the payee, for medical services rendered by him to the defendant's ward, and that it was not the intent of the parties, in giving or taking of the note, to bind the defendant, personally, for the debt:

Held, That there was nothing in this evidence, as stated, to show such a mistake, either of law or fact, as to authorize a reformation of the note, and the continuance was properly overruled.

Promissory Notes. Mistake. Guardian. Before Judge ANDREWS. Wilkes Superior Court. June, 1870.

In 1862, Poole gave to Dr. Walton his promissory note, payable to bearer, and signed "J. S. Poole." Wilkinson sued Poole on this note, in a Justice's Court. Poole pleaded that said note was given for the settlement of a debt due by his ward, W. N. T. Jones, and was only intended, and so understood when given, to bind her property and not his, and that Wilkinson took the same after it was due. He moved to continue the case to prove this plea to be true. The Justice refused the continuance, and gave judgment against Poole. He took the case before the Superior Court by *certiorari*. There the *certiorari* was dismissed, upon the ground that the plea set up no defense to the action, and that evidence was not admissible to show that the note was not to bind Poole, individually. This is assigned as error.

W. M. & M. P. REESE, by L. E. BLECKLEY, for plaintiff in error. Mistake in paper corrected in equity: R. Code, sec. 3067; 30 Ga. R., 191, 948; 11th, 171; 1st, 12 and 240. Same, at law, in Georgia: R. Code, secs. 3027, 3041; 37 Ga. R., 364. Guardian may give such note as not to bind him, personally: Story on Prom. Notes, sec. 63; 39 Ga. R., 130.

D. M. DUBOSE, by R. TOOMBS, for defendant.

McCAY, J.

We have no doubt but that, under our law, the defendant, in a suit in a Justice's Court, may set up any defense that would be good in a Court of Equity: *Mordecai vs. Stewart*, 37 Georgia Reports, 365. But the defense must be distinctly set up, so that the right to relief in equity shall clearly appear by the pleas. Would a Court of Equity reform this note, under the facts as stated? Was there here such a mistake, either of law or fact, as gives either party an unconscientious advantage over the other? Revised Code.

This was a debt due by the guardian to Walton, for medical services rendered the ward. *Prima facie* the guardian was personally liable upon it. We know of no law to authorize a suit at law against the guardian *as such*, for such a debt. Perhaps if the guardian were insolvent, and it could be proven that the services were necessary to the ward or the estate of the ward, equity might grant relief, and cause the the debt to be paid out of the ward's property. But, *prima facie*, such a debt as this is claimed to be, is a personal debt of the guardian. It is true, if he pays it, he may charge his ward with it, but there is no legal privity between the creditor and the ward.

To make out the case the plea and the evidence ought to show, not only that the debt was for services rendered the ward, but that they were rendered on *the credit* of the ward's estate, and not on the credit of the guardian. Perhaps, if

that had been alleged, the defense was good. But the allegation that it was not the intent of the parties in *giving* or *taking* the note to charge the guardian, does not negative the idea that the guardian was chargable with the debt, at the time it was contracted.

Judgment affirmed.

JAMES H. ROGERS, sheriff, plaintiff in error, *vs.* REBECCA SILAS *et al.*, defendants in error.

When, in a rule against the sheriff, he answered that he had not made the money, because the *fi. fa.* issued upon a judgment founded on a note given for negro property, which was admitted on the hearing:

Held, That, while a sheriff is a ministerial officer, and it is his duty to execute all process placed in his hands, and let defendants set up their defenses to such process, yet, under Article V., section 17 of the Constitution, and Article XLI., section 6, there was no jurisdiction in the Court, upon such answer, to make the rule absolute against such officer, and that the exceptional character of the case and the constitutional inhibition of jurisdiction was protection of such officer in the premises against rule. WARNER, J., dissenting.

Constitutional Law. Rule *versus* Sheriffs. Slave-debts. Before Judge ANDREWS. Hancock Superior Court. June, 1869.

Rebecca Silas *et al.* had a *fi. fa.* against Stacy *et al.*, but upon what judgment it was founded, or when it was issued, do not appear. The sheriff sold certain of defendants' property, and paid out the money to other *fi. fas.* He was ruled to show cause why he should not pay this *fi. fa.* He answered that, though he had it in hand, he had overlooked it, and, besides, that he was prepared to show that it was issued from a judgment founded upon a contract, the consideration of which was slaves. This answer was demurred to, and the Court ordered him to pay the money. This is assigned as error.

LINTON STEPHENS, for plaintiff in error.

No appearance for defendants.

LOCHRANE, C. J.

The record in this case is very brief; in fact, too brief for the proper understanding of the history of the case. It appears that, at the April Term, 1869, the defendant in error, by rule *nisi*, called upon Rogers, sheriff, to show cause why money had not been collected. The rule does not show when the *fi. fa.* was obtained, but merely recites its existence; and to this proceeding the sheriff's answer alleges that the *fi. fa.* in question, issued upon a judgment founded on a consideration for negro property.

We have been restrained, in this case, to consider whether, when a *fi. fa.*, issued from a Court, was placed in the sheriff's hands to execute, his office being purely ministerial, he had a right to set up this defense to its execution; or whether it was not his duty to levy and let the defendant in *fi. fa.* raise such issues as were not apparent on the face of the papers. Such was the view held by this Court, at this term, in the case of *Martin, sheriff, vs. Huson*, etc. But after a careful consideration of the fact alleged by the sheriff, in this case, that he ought not to be adjudged in contempt of the process of the Court, by virtue of the character of this debt, which he verifies, and it is admitted to be for negro property, we are of opinion that the Court erred in making the rule absolute.

Article V., section 17 of the Constitution of 1868, provides: "No Court or officer shall have, nor shall the General Assembly give jurisdiction or authority to try, or give judgment on, or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof." And Article XI., section 6, among other things, provides that judgments not executed shall proceed and be performed in such cases only as the Constitution gives jurisdiction over the causes, etc., on

which such judgments are founded. Now, it appearing from the sworn answer of the sheriff, that this judgment was within that class over which, by the Constitution, jurisdiction was denied, both to the officers and to the Courts, we are of opinion that, on such answer, not traversed, and standing admitted before the Court below, he had no power to pass such order in the premises. This belongs to a class of cases exceptional in character, and under a constitutional inhibition of jurisdiction, both as to Courts and officers, and the answer of the sheriff not being contradicted, made such an admitted record as excused the sheriff, under the facts in this case.

But while we have gone to the fullest extent in the protection of officers under the law, we deem it proper to state, admonitory of the duty of sheriffs in the premises, that the safest way to execute their official duties, and save themselves and sureties from ultimate liability, is to simply discharge their ministerial duties, and let defendants move for their own protection, by asserting their constitutional or other defenses, if they exist.

Judgment reversed.

McCay, J., concurred, but furnished no opinion.

Warner, J., dissenting.

A sheriff is a *ministerial* and not a *judicial* officer, and when an execution is placed in his hands for collection, issuing from a Court of general jurisdiction, regular upon its face, it is not a legal showing for the sheriff, in answer to a rule for not making the money due thereon, to state that the consideration of the debt on which the judgment was obtained was for a slave or slaves; the more especially as the record in this case does not show whether the judgment was obtained before or since the adoption of the Constitution of 1868. For aught that appears from this record, that defense may have been set up on the trial of the case in which the

judgment was rendered. There is nothing on the face of the judgment or execution, showing that it was founded on a slave debt, and unless that fact had been made judicially to appear to the sheriff, by an affidavit of illegality, or other lawful proceeding, he cannot, on his own mere motion, suggest that fact as an excuse for not performing his duty, when ruled for the money. The sheriff cannot, as a ministerial officer, be allowed to go behind the judgment and decide for himself, that the debt on which it is founded was a slave debt, as an excuse for not obeying the mandatory process of the Court placed in his hands. It was no more a *legal* excuse for the sheriff, as a ministerial officer, when ruled for the money, to assume and decide for himself, that the execution issued on a judgment for a debt, the consideration of which was a slave or slaves, than it would have been for him to assume, and decide for himself, that the execution had issued on a judgment founded on a gaming debt, or on a debt to compound a felony, or any other illegal consideration. That was no part of his legal duty as sheriff, and consequently is no legal defense to the rule against him.

JIM BANKS, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

On a trial for murder, proof was given of the confessions of the prisoner, that the deceased had met him in the public road and attacked him suddenly and violently, by beating him with a stick; that he had remonstrated, and finally, holding the stick with one hand, he had, with the other, taken out his knife, and opening it with his teeth, he had stabbed the deceased twice, and deceased was shortly after found dead. But it was proven, in addition, that deceased was stabbed in four places; that the prisoner, on examination at the time, was without bruise or hurt, and that he was found in possession of the pistol, and the jury found a verdict of voluntary manslaughter, and the Court below refused a new trial:

Held, That this Court will not disturb the judgment of the Court below.

Banks *vs.* The State of Georgia.

Criminal Law. Confessions. New Trial. Before Judge ANDREWS. Elbert Superior Court. September Term, 1870.

Banks, a negro, was indicted for the murder of another negro. The evidence consisted of proof of the killing, and a confession, and certain other facts to show that Banks was the slayer, and the circumstances of the killing. This evidence would be of no use to the profession, further than it appears in the opinion. He was convicted of voluntary manslaughter, with a recommendation to mercy.

A new trial was asked for, solely on the ground that the verdict was contrary to law, etc. Its refusal is assigned as error.

E. P. EDWARDS; JOHN P. SHANNON, by W. G. JOHNSON, for plaintiff in error. Confessions not sufficient for conviction: R. Code, sec. 3739. Defendant guilty of murder or innocent: R. Code, secs. 4254, 4255, 4256, 4264–5–6-7-8, and other sections as to homicide. Verdict wrong: 40 Ga. R., 696.

J. M. MATTHEWS, Solicitor General, by Z. D. HARRISON, for the State. Weight of confessions: 20 Ga. R., 752; 11th, 226. New trial: 2d, 173.

McCAY, J.

Were the verdict in this case founded *only* on the confession of the prisoner, we would conclude he was not guilty of any crime. His case would fall under section 3624 of the Code. It would be the killing of a human being in defense of one's person against one manifestly intending and endeavoring by violence or surprise to commit a felony upon it, and would, therefore, be justifiable homicide. But there is much more here than the confession of the prisoner. Here is a man found dead, stabbed in four places; the prisoner is proven to have gone towards the spot about the time the

killing took place, and almost immediately after the deed is done he is found close by, with the pistol and knife of the deceased in his possession. It is proven, too, that he had a few hours before struck the deceased's child. He is, on examination, without bruise or hurt. From these facts the inference is almost irresistible that the prisoner did the act. His own account of the affair, which the State introduced, does indeed put a different face upon the matter. But it is somewhat inconsistent with the other facts; especially does it fail to explain how he got deceased's pistol, and it admits only two stabs, when in fact there were four. The jury were not bound, and indeed could not believe every word of the confession. They had the right, and it was their duty, to take all the evidence and form their judgment upon it. It is the province of the jury to do this, not of the Court. We do not think their verdict is so wide of the truth as to require this Court to set it aside as illegal, and that, too, after the Judge who tried the case has refused to interfere. We think a verdict of manslaughter, under the evidence, is sustainable, and that the new trial was properly refused. There is a large discretion left to the Judge in the punishment in such cases, and as the jury recommended to mercy, and the Judge has been very merciful, we think best to let the verdict stand. Human life ought to be held very sacred, and there are few cases where it is taken away when there is *no fault at all* in the killer.

Judgment affirmed.

Echols *vs.* Grattan.

JOSEPH H. ECHOLS, plaintiff in error, *vs.* P. R. GRATTAN, executor, defendant in error.

1. Suit was brought on three notes, of which the following is a copy:

"$1,761 33—Twelve months after date, I promise to pay Eliza F. Gilmer, or bearer, the sum of seventeen hundred and sixty-one 33-100 dollars, for value received; the said sum to be paid in currency, at the present rates, 148 to 100, or in whatever good currency may be used at the time the note falls due, with interest from date, December 1st, 1865."

And the defendant set up, by his plea, that the intention of the parties to the contract was, that the property purchased, for which the notes were given, was valued in currency, and the gold equivalent of the currency was made the standard of the payment, which, at present rates, would reduce the amount of the principal due:

Held, That the principal due was a fixed amount, expressed in the face of the note, and that the sum stipulated to be paid is the principal due under the contract, and cannot be reduced by any theory of construction arising out of the terms of the instrument:

2. *Held again*, That, while the legal intendment of the party may be inferred to mean currency, in the expression *dollars* in the note, such intendment is qualified by the terms of the contract; and the words, "the said sum to be paid in currency, at the present rates, 148 to 100," which was the value of gold at the time, bears intrinsic evidence that this provision for payment in currency, at a stipulated rate, was based upon a gold standard in the sum fixed to be paid in such currency:

3. *Held again*, That the superadded words providing for payment in currency, at present rates, 148 to 100, or in whatever good currency may be used at the time the note falls due, strengthens the construction that the principal was the *sum fixed to be paid*, and the term *good currency*, contemplated by the parties, reasonably intended a better currency than that previously expressed, and that the plaintiff was entitled to recover the principal and interest, in good currency.

4. While we do not affirm the principle of construction charged by the Court as the law of this case, nor accept the finding of the jury as strictly accurate, under our view of construction, still, as it appears, from the credits and terms and time of the trade, that Mrs. Gilmer contracted to receive good currency in payment of the note, and the verdict accomplishes substantial justice between the parties, we affirm the judgment of the Court below. WARNER, J., concurred.

McCAY, J., dissenting:

A promissory note made in 1865, payable, generally, in dollars, is payable in United States currency, and when the parties add to such a

note the words, "payable in currency, at the present rates, 148 to 100, or in whatever good currency may be used at the time the note falls due," the true construction is, that they intended to make the note payable in currency, at all events, but that it should be secured and paid as discharging more or less of the face of the note, accordingly, as it should, at the time, be worth more or less than the rate agreed on, to-wit: 148 to 100.

Promissory Notes. Contracts. Before Judge ANDREWS. Oglethorpe Superior Court. October Term, 1870.

Grattan, as executor of Mrs. Gilmer, brought "complaint" against Echols on three promissory notes, for $1,761 33 each, dated the 1st day of December, 1865, due at one, two and three years after date, respectively, with interest from date, made by Echols, payable to Mrs. Gilmer, or bearer. The first of them was in these words:

"Twelve months after date, I promise to pay Eliza F. Gilmer, or bearer, the sum of seventeen hundred and sixty-one 33-100 dollars, for value received; the said amount to be paid in currency, at the present rates, 148 to 100, or in whatever good currency may be used at the time the note falls due, with interest from date, 1st December, 1865.

"J. H. ECHOLS."

On it were indorsed the following credits:

"Received December 1st, 1866, one hundred and twenty-three 29-100 dollars on the within note, in United States currency."

"December 31st, 1867. I have paid, this day, five hundred dollars, in United States currency, at the rate of $1 33 to $1 00, on this note—the present value of gold."

"December 21st, 1868. Received of J. H. Echols three hundred and fifty dollars, in currency, currency being now $1 35 for $1 00 in gold."

The other two were just like this, except that they were due at two and three years, respectively, and had no credits on them.

Besides the general issue, Echols pleaded as follows: In making and accepting said notes, the true intention of the parties was to take the currency then in use, as the standard of *pricing the property*, for which the notes were given and the gold equivalent of the currency price, *at that time*, as the standard of *payment*. And this gold equivalent was to be ascertained by multiplying the number of dollars named in the notes by one hundred, and dividing the product by one hundred and forty-eight; this result, to-wit: $3,570 27, in gold, being the amount of *value* which the parties stipulated defendant was to pay and the payee was to receive. And gold, and nought else, was made, and intended to be made, the sole and exclusive *standard of value and measure of payment*. The provision, as to payment in currency, was not for any *particular currency*, but only for such an *amount* of whatever currency might be used as should be equivalent in value, at the *time of payment*, to the stipulated sum of gold; the sum of gold to be ascertained and *fixed* at the *date* of the *notes* by said rule. This provision was intended for defendant's benefit, and gave him the option to pay, in lieu of the stipulated sum of gold, such an amount of currency as would be equivalent to gold at the *time of payment*. And so $608 91 in gold is due on the first note, as principal, with interest from date of last payment to date of tender, and the amount due on the other two is $2,380 17, in gold, with interest from the 1st of December, 1865, to the date of tender. Further, he pleaded a tender, made the 31st of March, 1870, of the amount due on said notes, according to said rule.

Plaintiff's counsel introduced the notes and closed. He admitted that one hundred and forty-eight to one hundred was the rate of currency to gold at the date of the notes. There was no other evidence.

The Court charged the jury, that the contract on each of the notes was an obligation to pay in legal tender notes of the United States, the number of dollars expressed on the face of the notes, regardless of the value of such legal tender

notes as compared with gold at the time of payment, and that the credits were to be counted for the number of dollars expressed in them, respectively, and that they should find in dollars and cents generally, without specifying the medium of payment. The jury found $1008 00 principal, and $129 36 as interest on the first note, and $3,522 00 as principal, and $1,205 00 as interest on the others, with costs of suit. Said charge is assigned as error.

LINTON STEPHENS, W. G. JOHNSON, for plaintiff in error. Intention governs: Revised Code, sections 2713, 2714, 2715. Defendant had option as to payment: 1st Bouv. Inst., 268, notes *a* and *b*; 2 Par. on Con., 169, 170; Chipm. on Con., 35, 36; 1st Poth. on Ob., 245, 246, 247, 248, 250; 11 John. R., 59, 60; 1st Douglass R., 16. Change of currency cannot change notes: 3d Fairfield's R., 441; 8 Wallace R., 557; Sedg. on Dam., 202, 203, 233; 1 Poth. on Ob., 33, 160, 169, 170; Fry on Specific Performance, sections 235, 237, 252; Sedg. on Dam., 417, 418, 419, 37, note 2, 422, note 1, 468, 469; 3 Car. & P., 240. Dollars means national currency dollars: Legal Tender Act 25th February, 1862; 8 Wallace R., 612, 613. Agreed value is measure of damages: Revised Code, section 2894; Chipm. on Con., 35, 36; 3 Conn. R., 60; 5 Wend. R., 393; 42 Maine R., 233; 7 Wallace R., 260; 30 Ga. R., 348: 40th, 476; 12 S. & M. (Miss.) R., 495; 4 Dall. R., 411; 1 Brock R., 115; 15 Ohio R., 129, 130; 24 Ill. R., 482; 18th, 58, 59; 17th, 39, 40; 9 Cal. R., 364; 12 Ind. R., 503, 504. The credits to be measured same way: Revised Code, section 2858; Waterman on Set-off, etc., 474, 475.

S. H. HARDEMAN, R. TOOMBS, for defendant. Construe notes strongly against maker if doubtful: Revised Code, section 2715, (4).

LOCHRANE, C. J.

1. This case comes before the Court on the construction of a contract in writing, entered into between the parties in the following words, to-wit:

"Twelve months after date, I promise to pay Eliza F. Gilmer, or bearer, the sum of seventeen hundred and sixty-one 33-100 dollars for value received; the said amount to be paid in currency at the present rates, 148 to 100, or in whatever good currency may be used at the time the note falls due, with interest from date, December 1st, 1865.

"J. H. ECHOLS."

Two notes similar to this were given, due at two and three years after date. Upon suit brought, the defendant pleaded that the intention of the parties to this contract was, that the property was valued in currency, and the gold equivalent of the currency was made the standard of payment, etc. The fact was admitted, that at the time of the contract, gold was worth one hundred and forty-eight to one hundred. This, with the entries of credits on the notes, constituted all the evidence in the case.

The Court charged the jury that the contract expressed in each of the notes created an obligation to pay in legal-tender notes of the United States so many dollars as are expressed in the face of the notes, without regard to the value of such legal tender notes as compared with gold at the time of payment, and that the credits were to be counted for the number of dollars expressed in them, respectively, and that their finding should be in dollars and cents, generally, without specifying any particular kind of money as the medium of payment.

The question turns upon the construction of the notes, and this construction must be given upon the notes themselves. The death of Mrs. Gilmer prevents the defendant from testifying, and thus we are restrained to the interpretation of intention from the language of the instrument.

It is contended that the value of the property sold was estimated in currency; upon payment, the estimate was to be upon the gold standard, at the rate currency held to gold at the time of the contract. By this rule the appreciation of currency reduces the face of the note to that standard. As, for illustration: the principal, $1,761 33, at one hundred and forty-eight to one hundred, if the currency were at the same rate now as then, would be still that amount, $1,761 33; but as currency has improved, and is some one hundred and ten to one hundred, the principal is reduced to that *pro rata* standard, and may be discharged by the payment of that much less, some $1,200 00.

We have gone through the authorities presented to sustain this view of the case. But after a close consideration of what this contract expresses as the intention of the parties thereto, it presents to our mind but one simple solution. Mrs. Gilmer sold certain property for a definite, ascertained amount, which is expressed in the face of each of the notes. "I promise to pay Eliza F. Gilmer, or bearer, the sum of $1,761 33, for value received." By whatever construction we may reduce the value of the currency, in which this sum is to be paid, we cannot see how or upon what theory the amount promised, *a specific* sum to be paid, can be reduced.

It may be argued, that if the note had simply stopped at the point just recited, it would have been payable in currency, that such was its legal intendment, broadly and without condition. Yet if it had, it is clear that the sum to be paid as principal was the amount stipulated to be paid in the face of the note.

But the note goes on to provide how the sum is to be paid. Its language is, "the said amount to be paid in currency, at the present rates, one hundred and forty-eight to one hundred." This provision of payment in currency bears upon its face that the original amount was on some other basis than currency. Or, why stipulate that the said amount is to be paid in currency? And what the basis was becomes

more clear when we examine how the currency is to be rated as to its payment—one hundred and forty-eight to one hundred, which was the value of gold as compared with currency at the time. Putting these facts together, it would appear to have been the original intent of the parties to have put the principal sum to be paid on a gold basis, and provide for the payment, in currency, at the rate the gold was worth at the time. Some ambiguity, it is contended, exists as to the intent of these parties by the superadded condition following the language, cited in these words: "the said amount to be paid in currency at the present rates, one hundred and forty-eight to one hundred, or in whatever good currency may be used at the time the note falls due, with interest from date."

Now, the good currency is not expressed, but in contemplation of the parties it must have meant some currency better than the then currency, worth one hundred and forty-eight to one hundred, and if in bank bills, *or good currency at the time the notes fall due* contemplated any currency, and present currency may, by its appreciation, be regarded *good currency*, within the meaning of the parties, if it was equal to gold, we still do not see how this contract can be construed to mean that a less sum than the principal with interest is to be paid in such good currency; for it certainly expresses that sum, to-wit: $1,761 33-100, to be paid in whatever good currency may be used at the time the note falls due, with interest. Or if we take the previous stipulation, that the currency was to be at the rate of one hundred and forty-eight to one hundred, in either event, it appears to us that Mrs. Gilmer was to have that amount, agreed upon and expressed as the principal, due to her. This is the construction we give the instrument itself.

Now let us see what meaning attaches to the credits. There are three credits; the first simply specifies the receipt of a certain sum in United States currency. The other two, received by counsel for the executor, express one payment at the rate of one hundred and thirty-three to one hundred,

and the other at the rate of one hundred and eighty-five to one hundred. We gather from these credits the idea of the defendant, Mr. Echols, that there was something in the rate of appreciation of the currency in which the credits were made. But we are compelled to the conclusion that there is no where evidence of this contract being predicated on the basis that would reduce the sum to be paid specified in the note.

Upon considering the construction of this instrument and the intention of the parties, as we must take it from the notes themselves, we think Mrs. Gilmer entitled to receive the principal agreed upon; and in receiving this she gets all she contracted to receive. And, inasmuch as the present currency may be considered as good currency, within the meaning of the contract, while neither the charge of the Court nor the verdict may come strictly within our construction of the statute, yet as substantial justice has been done, we affirm the judgment of the Court below.

WARNER, J., concurred, but wrote no opinion.

McCAY, J., dissenting.

I cannot concur in the opinion of a majority of the Court. I cannot think it was the intent of the parties that this contract was intended to be payable in gold, or in currency at its gold value. It would have been so easy to say this, by adding, after the sum, the words, "in gold, or in currency at its gold value," that the failure to do it is, to my mind, conclusive that such was not the intent. Besides, if this was meant, why fix the then value of currency? If it was to be paid at the gold value, what did the then rate of currency have to do with it? The first payment was made when currency was very nearly what it was when the note was made, and the credit was put on the note for the full amount paid. This is a strong circumstance to show that it was not intended the note should be paid in currency at its gold value.

Nor can it be, with any show of reason, said that it was to be paid in currency at one hundred and forty-eight for one hundred, whatever might be its true value; since in that view, as currency was, by the contract, demandable, the defendant might have to pay more than even the gold value. Currency is now only one hundred and ten; to pay it at one hundred and forty-eight, would give the payee of the note more than even gold.

There are but two other views: 1st. They might have meant that the note should be paid in a currency worth *at least* one hundred and forty-eight to one hundred, and if worth more, that the payee should have it, dollar for dollar, by tale. But it seems to me that if they had meant this, they would have used the words "at least," or some equivalent words.

My judgment upon the whole is, that the parties intended by the note that it should be paid in currency, or in any other circulating medium in common use at the time of payment, and that they fixed the mode by which the value of it should be ascertained and credited on the note, to-wit: it should always pay just as much of the note as it was worth, more or less than one hundred and forty-eight to one hundred. The value of the property, as then agreed upon in currency at its true value, was always to be paid—no more, no less. If the currency got worse, the debtor was to make it worth one hundred and forty-eight to one hundred; if it got better, it was to pay just as much more of the face of the note as it was worth more than one hundred and forty-eight to one hundred.

ROBERT STAFFORD, plaintiff in error, *vs.* HUGH W. MERCER *et al.*, defendants in error.

1. The seizing of cotton and provisions on Cumberland Island, on the Georgia coast, by the military authorities of the Confederate States, during the late civil war, to prevent the same from falling into the possession of approaching United States forces, was an act of war, and the individuals engaged in moving the same and transporting them to a place of safety within the Confederate lines, are not liable as trespassers to the owners of the property.
2. An action of trespass *vi et armis* will not lie against the clerk of a warehouse-man, who, on the lawful receipt of goods in store for another, sells them on the advice of his employer, but without the consent of, or authority from, the owner.

Capture of Private Property by Confederate States officers. Trespass. Before Judge SCHLEY. Chatham Superior Court. July, 1870.

Stafford brought trespass, *vi et armis*, against Mercer and Gue for the taking from his plantation certain cotton, corn and fodder, on January 2d, 1862. The defenses were the general issue, and that Mercer was a General, in the service of the Confederate States of America, at war with the United States of America; was ordered by his superior officers to take corn and fodder, for the use of the troops under his command, and to remove all property which might fall into the enemy's hands to a place of safety, and, pursuant to this order, had said cotton, which was on Cumberland Island, subject to capture by the United States forces, taken to Savannah, Georgia, as a place of safety, and stored, for Stafford, with Stafford's usual factor, whose clerk was said Gue. All which he claimed he had a right to do, under the laws of war; and that defendants were protected from any recovery, also, by an Act of the General Assembly of Georgia, approved 15th February, 1866, for the relief of Confederate States soldiers, for acts done under orders of their superiors. The taking, by certain Confederate officers, the value of the property, etc., was shown, by Stafford. For the defense, it

was shown that the taking was under and pursuant to orders from General Mercer; that it was necessary for the exigencies of the service, and to keep it out of the hands of the enemy; that the usual receipts were given therefor, and that the cotton was stored with plaintiff's usual factor, at Savannah, where he was notified that it would be left. It further appeared that this factor was absent, in the service; that Gue was his agent and clerk, and that Gue, after consulting the factor and the military authorities, sold it, because Savannah was threatened by United States forces, and placed the Confederate money gotten for it to plaintiff's credit, but that plaintiff got no notice of this sale, etc., communication with him being cut off till the end of the war. Plaintiff got nothing for any of said produce; he refused, at the time of seizure, to receive the usual government price for his corn and fodder.

The evidence being closed, the Court charged the jury as follows:

1. If the jury find from the evidence that the plaintiff consented to the removal of the property in question, then there was no trespass, and he cannot recover.

2. If there was a state of war existing between the United States and the Confederate States in 1862, when the property in question was taken and removed, and if General Mercer was an officer in the Confederate army, and as such officer ordered the removal and taking of said property by the command of a superior or higher officer of the Confederate States, as an act of war, then Mercer is protected, and is not a trespasser, and is not liable to respond in damages.

3. If the defendant Gue received the cotton as the clerk of John W. Anderson, who was the ordinary factor of Stafford, the plaintiff, (even though he knew the circumstances under which it was taken and removed,) still he is not liable as a trespasser in that event. If any one is liable under that state of facts it is John W. Anderson, the principal, and not Gue, the clerk and agent.

Counsel for plaintiff then requested the Court to give the following charges:

1. That any unlawful interference with the private property of a citizen by another is a trespass, and for such the law gives damages. (The Court so charged).

2. In trespass all are principals, there are no accessories. And each is liable for the full amount of the damages accruing by virtue of the trespass; and to constitute one a trespasser it is not necessary that he should have done the act complained of personally, but all who are in any way aiding, assisting, advising, commanding or countenancing it, are responsible as principals, as well as those who perpetrate the act. (The Court so charged).

3. The Act of the Georgia Legislature, of February, 1866, for the relief of *bona fide* Confederate soldiers, which has been pleaded in this case by defendants is not law, was not when the plea was filed, the said Act being repugnant to the Constitution of the United States and the Constitution of Georgia, and that the jury cannot take said Act into the consideration of this case as law. The Court refused to give said charge, and stated that he would not charge upon the constitutionality of the Act of 1866, saying the second head of his charge would cover the case, and it was unnecessary to notice said Act. And, at this stage, the Court, (after refusing to charge as requested, and giving the intimation that the charge was unnecessary,) let the defendant's counsel strike the plea of defense under the said Statute of 1866, after the same had been argued upon to the jury and Court, both by counsel for plaintiff and defendants.

4. That the attempt on the part of the State of Georgia to withdraw from the Union was illegal, that the organization of the Confederate States into a Confederacy in hostility to the United States Government was illegal; that the laws passed by the State of Georgia, and those enacted by the Southern Confederacy, from the date of secession up to the termination of the late war were illegal and void. And if

the defendants did (by virtue of any of the above mentioned laws) any act to the plaintiff's property, which, under the Constitution of the United States and the laws pursuant thereto, amounted to a trespass, such authority being derived from an illegal power, and one in hostility to the government to which plaintiff owed allegiance, cannot justify the act and protect the defendants. That any order or command emanating from either the civil or military authorities of the Confederate States, commanding the defendants to do that which in the eye of the law is a trespass, will not protect them if they did the act. (The Court refused so to charge.)

If the taking of the plaintiff's property by these defendants was a trespass under the Constitution and laws of the United States, it makes no difference whether defendants took it by command of a superior officer or of their own accord. In either case they are trespassers, and the jury are bound so to find. (The Court refused so to charge.)

6. If the jury believe from the facts of this case as disclosed by the evidence, that General Mercer issued the order as an officer of the Confederate States army, by virtue of which plaintiff's property was seized, without the consent of plaintiff, and without any compensation at the time of seizure, and further, if they find that F. L. Gue received the cotton and produce thus seized, knowing the circumstances under which it was taken and that the same belonged to plaintiff, or if Gue sold the same without any order from plaintiff, then, in law, both Mercer and Gue are trespassers, and the jury must so find. (The Court refused so to charge.)

The jury found for the defendants. A new trial was moved for, upon the grounds, that the verdict was contrary to law, etc., and that the Court erred in charging as he did, in refusing to charge as requested, and in allowing said plea of the Act of 1866 stricken, as aforesaid. The Court refused a new trial, and error is assigned on each of said grounds.

ANDREW SLOAN, for plaintiff in error. The second charge was error: 1 Bay. R., 15; 1 Baldw. R., 571; 1 Swift's Dig., 187; 2 Leigh's N. P., 1443; 7 Comyn's Dig., 515; Arch. N. P., 302, 354. Gue receiving the cotton, knowing the facts, was trespasser: 37 Ga. R., 277; 3d, 31; 12th, 614; 11 John. R., 285; 12th, 408; Old Code, secs. 2204, 2205, 4908, 5054; R. Code, sec. 2962. Regard for private property: 3 Wal. S. C. R., 9, 10. Fifth request to charge was right: 37 Ga. R., 515, 532; 9 Wal. S. C. R., 197; 4 Am. L. Reg., 95. Command of superior does not justify defendants: 11 John. R., 285; 12th, 408; 14th, 119; 3 Cranch R., (Cond.,) 552; 13 How. R., (Cond.,) 421; 1 Black's C. C. R., 549; 2 Cranch's C. C. R., 117; 1 Cowper, 180. Confederate States war a rebellion: 4 Am. L. Reg., 95; 9 Wal. 197.

T. E. LOYD; HARTRIDGE & CHISOLM, for defendants.

MCCAY, J.

1. We do not think that the legality of the Confederate Government, or even the validity of its civil laws, *pro tempore*, as the acts of a government *de facto*, arises, under the facts disclosed by this record. The seizure of this cotton was not pretended to be done by virtue of any laws of the Confederate Government, nor was it seized by a civil officer, or by virtue of any civil process. It was done, avowedly, as an act of war, by a regularly organized military force, and by virtue of military orders. It was done, avowedly and actually, to prevent the cotton from falling into the hands of the United States forces, and, as we suppose, it was only seized and transported to Savannah, rather than destroyed, in mercy to the owner, and because the purpose to be attained, could, under the circumstances, be as well attained that way as by its destruction.

The real questions, therefore, are: 1st. Was the seizure of this cotton a belligerent act, an act of war, legitimately, ac-

cording to the practice of civilized nations? 2d. Admitting it to be such an act, is General Mercer personally responsible for it as a trespass?

It will be found impossible to lay down any precise rule as to how far it is legitimate to interfere with private property in the prosecution of a war. The general rule undoubtedly is, that private property, not contraband of war, is not to be interfered with. But as to what is contraband, seems to be wholly unsettled. Every war gives it a new definition—the belligerents always finding some new phase of affairs to justify their conduct.

In the case of Mrs. Alexander's cotton, 2 Wallace, 404, the Supreme Court of the United States held, that cotton within what was called the Rebel States, or rebel territory, was the subject of *capture* by the United States forces, even though it belonged to a person loyal to the United States, on the ground, that it was a material part of the *sinews* of war. Do not the principles laid down in that case settle this question?

If it was a *belligerent* act for the United States forces to seize cotton, that it might not be taken by the Confederates, would it not necessarily follow that it was a belligerent act for the Confederates to seize it, to prevent it falling into the hands of the Federals? 2 Wallace, 424. What but this principle can afford any justification for the desolation of the Valley of the Shennandoah by General Sheridan; the destruction of Atlanta by General Sherman, and of innumerable acts, by both parties, in the four years civil war, the ravages of which still dot the land with ruins? It is admitted upon all hands that the *Confederates* were *belligerents*. They were recognized as such by the principal nations of the world, and by the United States itself. If the recognition of belligerency means anything, it means that the acts of individuals, in the legitimate progress of the war, are to be treated as the acts of the belligerent; that the individual is not responsible to the civil tribunals, for any act done in the legitimate progress of the war.

Unless this be so, every Confederate soldier is liable, now, to indictment, either as principal, in the first or second degree, or as accessory, to the unlawful killing of those who fell upon the field of battle. If this be so, too, this action will not lie, because the trespass is merged in the felony; since, if this was not a belligerent act, it was robbery: See Revised Code, section 2919. In any view of it, we think the charge of the Court, upon this branch of the case, was right.

2. As to Güe, the other defendent, he was but the agent of the owner of the warehouse. As we hold the seizure of the cotton not a trespass, it came legally and properly into the possession of the warehouseman. He was no trespasser in the receipt of the cotton. The same belligerent force which removed it from the plantation of the owner, against his will, deposited it with the warehouseman in Savannah, and it was legitimately there. If it was improperly sold after it was put there, under the direction of the warehouseman, the clerk who sold it is not responsible. He is but the servant of his principal. If the taking was a trespass, all concerned are liable, but if it was legitimately there, and was sold without authority by the warehouseman, or by his direction, he and not the clerk is responsible.

Judgment affirmed.

JACOB GODFREY *et al.*, plaintiffs in error, *vs.* ROBERT D. WALKER *et al.*, defendants in error.

1. If a paper has been diligently searched for and cannot be found, its contents may be shown by parol. (R.)
2. Though notice to quit was not served upon the proper agent of the tenant, yet if the tenant got the notice it is sufficient. (R.)
3. If the printed minutes of a Conference were read to a party by one who knew they were the minutes, it is competent to read said minutes in evidence to show what was read to the party. (R.)

Godfrey *et al. vs.* Walker *et al.*

In a proceeding by trustees to turn out tenants of their church, their hairman may make the affidavit. (R.)

It appears from the record, that on the 24th day of September, 1845, deed was made to the land in dispute (upon which Andrew Chapel as afterwards erected) to trustees for the use of the colored members f the Methodist Episcopal Church, South, within the jurisdiction of he General Conference of such church, and that a large portion of the ongregation using said house of worship, dissevered their connection ith the Methodist Episcopal Church, South, and united with the Afri- an Methodist Episcopal Church, the trustees at the time permit- ing the occupancy of the church to such organization; and afterwards, n 1865, the parties presented their memorial to the Georgia Confer- nce of the Methodist Episcopal Church, South, stating that they had ssociated themselves with the African Methodist Episcopal Church, nd requesting that this property be ceded to them; and the Confer- nce replied that the titles to the house of worship used by colored harges of their church were vested in trustees, and that they had no ower to convey the property to any other organization whatever, but ecommended that the colored people who were lately members "of ur church" be permitted to use them to worship in. And such action as properly notified to the parties, and they continued in their use of he church; and that in September, 1868, a notice to quit was served, esponded to in January, 1869, declining to give up the possession ntil compelled by law; and the chairman of the board of trustees nade affidavit under the 4005th section of the Revised Code, to which counter-affidavit was filed under section 4007; and issue joined, and he Judge charged the jury, in effect, that except it appeared that the lefendants were members of the Methodist Episcopal Church, South, hat the plaintiffs were entitled to recover.

ld, Under the facts in this case, that the title to the property vested y the deed in the trustees for the use of the colored members of the Methodist Episcopal Church, South, and just as soon as the members evered this connection, which was perfected by their uniting with the African Methodist Church, that instant they surrendered all legal right s beneficiaries to the use or occupancy of the church, and all claim xcept at the will or sufferance of the legal owners.

Held, again, Under the facts in the case, that their occupancy after notice of the permission to occupy, constituted them tenants-by-suf- rance, under the Code, to the legal owners. They were lawfully in possession before they ceased membership, and their remaining by permission of the lawful owners afterwards, was under the changed elation, established, by their severance from the membership of the hurch, and did not relate back to their original possession as mem- ers of the Methodist Episcopal Church, South. They were not tres- assers, for they had permission; nor were they owners, for they had

no color of title. They were not tenants-at-will, for they were not in under contract, and their *status* was that of tenant-by-suffrance, and subject to be removed under the 4005th section Revised Code of this State.

Secondary Evidence. Notice to Quit. Documentary Evidence. Landlord and Tenant. Before Judge SCHLEY. Chatham Superior Court. August, 1870.

Certain members of the Methodist E. Church, South, who worshiped in Andrew Chapel, at Savannah, Georgia, joined the African Methodist Church, and claimed the church property. Being in possession, they refused to give it up to the members of the church, South, and the latter began proceedings to eject them. The notice to quit was served upon the preacher in charge of the congregation in possession, and the affidavit for a warrant was made by the chairman of the board of trustees. After the evidence was introduced, the Court charged the jury, substantially, as follows:

In this issue, you must look to the testimony and find whether the deed offered, and before you, is a deed to the Trustees of the "Methodist Episcopal Church, South," known as Andrew Chapel; if you find that the church and property in dispute is conveyed to them, then, *prima facie*, they are the rightful owners, and entitled to its possession, unless the defendants in this case should show, by proof "or title," that they are entitled to it. Now, the defendants say they are the *cestui que trusts*, under the deed, and entitled to its benefits, being the same congregation, and are the beneficiaries under the trusts. You must look to the testimony and see if the defendants have shown you, by proof, that they are the congregation; if so, they are rightfully entitled to continue, and if there is any proof that it is occupied by other congregations or persons, other than the members of the Methodist Episcopal Church, South, and there is satisfactory evidence that the defendants are tenants-at-will, and if the notice has

n given according to law, the plaintiffs are entitled to re-
er.

The jury found for the plaintiffs. The defendants moved
a new trial, upon the following grounds:

st. Because the Court erred in admitting the testimony
C. D. Rogers, in regard to the notice to quit the premises,
same being in writing, and the original not accounted
and that a service of the same on the preacher in charge
a sufficient service on the party in possession.

d. Because the Court erred in admitting in evidence a
ted copy of a portion of the Minutes of the Georgia Con-
nce, held in 1866, the Assistant Secretary of the Con-
nce stating it was a correct copy of the proceedings of
Conferences.

d. Because the Court erred in holding that the chairman
the board of trustees was a competent party to make the
davit for the possessory-warrant, under the statute.

th. Because the Court erred in charging the jury as fol-
s: "You must look and see if the defendants have made
of that the members are the members of the Methodist
iscopal Church, South."

th. Because the Court erred in charging the jury as fol-
s: "If you find the defendants have not made this proof
plaintiffs are entitled to recover."

th. Because the Court erred in charging the jury that,
the plaintiffs are the owners of the property, then the
ation of landlord and tenant does exist."

th. Because the Court erred in charging the jury that,
he trustees hold the legal title, and have it now."

th. Because the Court erred in refusing to charge the
y that, "the legal estate continued in the trustees no longer
n the execution of the trust required, and then vested in
persons, beneficially entitled, the legal title merging in
equitable interest."

9th. Because the Court erred in refusing to charge the

jury that, "occupation of premises for many years is a tenancy from year to year, and that, in a tenancy from year to year, the tenant is entitled to six months notice to quit, terminating with the year."

10th. Because the Court erred in suggesting to counsel for the plaintiffs, during the progress of the trial, and while a witness was being examined, and pending an argument by counsel on the question of admissibility of a certain part of his testimony, and before the argument was concluded, to withdraw the witness and put up another, in order to hasten the cause, and in permitting counsel to do so, against the protest of counsel for the defendants; the question as to the value of the repairs was afterwards withdrawn, counsel for plaintiffs stating he should not claim rent; the Court stated he permitted this to speed the cause, while the counsel was getting his authority.

11th. Because the jury found contrary to the evidence.

12th. Because the jury found contrary to the weight of evidence.

13th. Because the jury found contrary to the law.

The Court refused a new trial, and error is assigned on said grounds. For further facts, see the opinion.

A. W. STONE, for plaintiffs in error. This proceeding is under Revised Code, sections 4005, 4007. To sustain it plaintiff must be landlord and defendant tenant: Revised Code, sections 4005, 2253. Comyn's Dig., Landlord and T.: Revised Code, sections 2259, 2260, 4005. Defendants were not tenants-at-sufferance: 4 Kent's Com., 117; 1 Bouv. L. D., 480; 2d, 574. Estates upon condition: Revised Code, section 2268; 1 Bouv. L. D., 481; 4 Kent's Com., 123, 124. Trust executed and title no longer in trustees: Revised Code, sections 2287, 2288, because *cestui que trusts*, slaves when deed was made, are now free: 4 Kent's Com., 325, 310; 1 Barn & Cress, 336. Parol evidence of notice to quit improperly admitted: 1 Gr. Ev., section 84; Revised Code,

section 3714. Defendants not tenants-at-will: 4 Kent's Com., 111; 1 Bouv. L. D., 480; 2d, 574; 12 Ga. R., 400; Revised Code, sections 2264, 2265. If tenants, they were from year to year: 2 Bl. Com., 140; 2 Bouv. L. D., 573, 574; 3 Burr, 1609; 4 Kent's Com., 112. But they were not tenants from year to year: Revised Code, section 2253. Conditions reserved only for grantor and his heirs: 20 Ga. R., 563.

A. B. SMITH, HARTRIDGE & CHISOLM, for defendants in error.

LOCHRANE, C. J.

It appears from the record in this case that on the 24th September, 1845, the trustees of the Methodist Episcopal Church, of Savannah, made a deed to the trustees of the Methodist Episcopal Church, South, to a certain lot of land for the consideration of ..... hundred dollars in trust, upon certain conditions and for certain uses therein specified; that such trustees were to erect and build upon the land conveyed a house of worship for the use of the colored members of the Methodist Episcopal Church, South, according to the rules and discipline which, from time to time, may have been adopted by the preachers and ministers of said church, at their General Conferences. The deed further provides for the appointment of trustees to fill vacancies arising from any cause; and, by virtue of this conveyance, such trustees went into possession and erected a house of worship for the purposes expressed, and called it Andrew Chapel. In the quiet administration of its spiritual affairs, it remained undisturbed and within the protection of the General Conferences of the Methodist Episcopal Church, South, until the capture of the city of Savannah by the Federal forces. In the convulsion of public sentiment consequent upon the fall of the city, several of the members of Andrew Chapel joined the African Methodist Episcopal Church, and, in this condition, the Trus-

tees of the Methodist Episcopal Church, South, permitted the occupancy of the church by them for the purposes of public worship, which was continued by the members of the new organization or African Methodist Episcopal Church. It also appears that Mr. Walker offered, in writing, to let them have this use, to which no reply was made, and in December, 1865, a memorial was addressed by the parties *plaintiffs in error* to the Georgia Conference, stating that they had associated themselves with the African Methodist Episcopal Church, and requesting that Andrew Chapel might be ceded to them. To this, as well as several similar applications, the reply of the Conference, by its minutes, is found in the resolution, "that the titles of the houses of worship used by colored charges are vested in the trustees for the use of colored members of the Methodist Episcopal Church, South, so that the Georgia Conference has no power to convey the property to any other organization whatever;" and concludes by recommending that the colored people who were lately members of *our* churches be permitted to use them temporarily for worship.

It also appears that in September, 1868, a notice to quit was served upon the parties, and responded to in January, 1869, declining to give up the possession until compelled by law.

In this condition of affairs, upon the 10th February, 1869, the Chairman of the Board of Trustees of Andrew Chapel made his affidavit, under the 4005th section of the Revised Code, praying process to dispossess the parties, in terms of the law, to which a counter-affidavit, under section 4007, was made, setting up that they did not hold the property in dispute by lease or rent, or at will, or by sufferance from the persons named, to-wit: The Trustees of the Methodist Episcopal Church, South.

Upon the issue joined on these proceedings, the case came on for a hearing, and the plaintiffs introduced the deed referred to in evidence, and the proof from which the recital

of facts have been stated; and the jury found the plaintiffs were entitled to the possession of the premises in dispute, upon which a judgment was entered. A new trial was moved upon thirteen grounds, which was overruled by the Court and excepted to, and now comes before this Court by writ of error.

The importance of this case may properly invoke, at our hands, a more than summary disposal of the questions involved, inasmuch as it involves the legal rights of occupancy to premises consecrated to the services and ordinances of religion, and the relative relations of those who, while clothed with the civil rights of trustees, also appear in such character, with the investiture of more than mere civil duty, as representatives of those who claim to be the rightful *cestui que trusts*, as colored members of the Methodist Episcopal Church, South, to their house of worship.

1. The first ground of error alleged, is the admission of the testimony of Mr. Rogers. This objection arises upon two grounds: First, in permitting him to prove the notice by parol, and not producing the original in writing; and, second, that its service on the pastor in charge was insufficient. We do not think that the Court erred in either of these particulars. Mr. Rogers stated that he was secretary of the board of trustees, and that he had received the communication from the chairman, and sent a copy to the church, and served notice to quit on the pastor in charge; he had hunted for the original and could not find it. Why, was this not sufficient to have let in the evidence? Under the rulings of this Court, at the present term, we have held this to be sufficient; and, further, under section 3714 of the Code, the fact of the primary evidence not being accessible to the diligence of the party, is made to the Court, who will hear the party himself and adjudge the question; and this Court will not interfere with his judgment, except the discretion is abused. In this case, the oath of the witness, that "he had hunted for the original paper and, after diligent search, failed to find

it," was all that could be required; it was not accessible to the diligence of the party and the secondary evidence was properly admitted.

2. Was the service upon the preacher in charge a sufficient notice? In this case, the church was occupied by a congregation, not in the light of individuals, but as an organization. The pastor, without going into any learned disquisitions of the duties of his office, stands, encircled by history, with special honors and privileges, associated with his sacerdotal duties. But, from the beginning, down to the last tragedy of Jewish history, we find little to enlighten a judicial opinion. In this country, church property vests, generally, in trustees, and not in the pastor. This is true, particularly of the Methodist churches, whose pastors are scattered and remain in only temporary positions; and, where there are trustees of churches, we deem them the proper parties to bring suit, or to defend them, or to serve with process or papers. In this case, the evidence is, that notice was given to both, and the answer of Godfrey is the admission of receiving such notice, being evidence that it had been known. And if it appears as a fact, in the case that they had the notice, we deem this sufficient.

3. The next ground of error is, that the Court erred in admitting a printed copy of the Minutes of the Georgia Conference held in 1866. The evidence was received upon the statement, under oath, of the Assistant Secretary of the Conference, who says the communication came under his personal supervision; that these are the minutes, etc., and that, as presiding elder, he went down and read them to the colored people. We are of opinion that the testimony of the secretary was sufficient to have let the proceedings on the minutes in evidence, for it was the very strongest testimony which could have been offered. The personal information of the secretary was stated, and that the communication was not preserved. In matters which appear, by properly organized bodies of men, upon their minutes, the evidence of the sec-

retary that they are the minutes is sufficient legal testimony to authorize their admission, in cases where such proceedings are required as evidence.

4. The third error assigned is, that the Court erred in holding the chairman of the board of trustees was the competent party to make the affidavit. The section 4005th of the Code says the affidavit may be made by the owner, his agent or attorney in fact or attorney at law. We do not deem it necessary to enlarge upon this question, as the statute is comprehensive, and the chairman of the board of trustees was competent to make the affidavit.

5. The fourth ground is, that the Court erred in charging the jury, "you must look and see if the defendant has made proof that the members are the members of the Methodist Episcopal Church, South."

The fifth ground is, his charge, "If you find the defendants have not made this proof, the plaintiff is entitled to recover." Both these assignments of error resolve themselves into the discussion of the legal question controlling this case, so far as the merits of recovery are concerned; and the judgment of this Court upon them will dispose of the seventh and eighth grounds taken in the motion for a new trial.

Was the charge of the Court error in placing the rights of defendants to the property upon the proof they were members of the Methodist Episcopal Church, South? For the whole question of right hangs on this point. The argument of counsel for plaintiff in error is, "that this deed was made to the trustees for the use of the colored members of the Methodist Episcopal Church, South; that, at the time the deed was made, they were incapable of holding property; that that incapacity being now removed, as they were originally the beneficiaries and had the equitable interest, as the reason of the trust is at end, the trust is extinguished, and the legal title goes over to them."

The application of such principles does not come within

the reach of this case. This deed must be construed in the light of the law, and as it was made in trust for the use of the members of the Methodist Episcopal Church, South, just as soon as the members dissevered this connection, which was perfected by their uniting with another organization, that instant they surrendered all claim to the use or occupancy of the church, except at the will or sufferance of the legal owners.

It has been argued that they are still members of the Methodist Episcopal Church, and the prefix of "African" to the name does not change their *status;* that the purpose of the trust was to provide a house of worship wherein to "expound God's holy word;" and that they have not refused to permit preachers of the Methodist Episcopal Church, South, to occupy the pulpit; and this is brought to bear in construing the condition of the deed.

We do not propose to discuss the differences of these church organizations outside what appears upon the record.

The record shows that they had associated themselves with the African Methodist Episcopal Church, and asked that Andrew Chapel be ceded to them. Here is a distinct admission of their having gone into another church organization. The fact is presented by themselves; and the response of the Conference recognizes this fact. "This property," says the Conference, "is vested in trustees for the use of colored members of the Methodist Episcopal Church, South, and we have no right to convey it to any other organization whatever," and concludes by saying, "that the colored people, who were lately members of *our* church," etc. Here is the admission of the one and the recognition of the other, that these two parties are not in the *church*, or members of the Methodist Episcopal Church, South.

If they are not, in what did the Court err in charging the jury? If they are not, the plaintiffs had the right to recover. The title to this property was in the plaintiffs. The deed was in evidence, and the defendants did not shew any

title to themselves. And except they were members of the Methodist Episcopal Church, South, they were not *cestui que trusts* under the deed, and had no legal right to the house of worship, no more than a congregation of colored Baptists.

The fact that they were original members gave them no legal rights except they remained members. The fact that they were colored had nothing to do with the question. The trustees of a white congregation, under the same facts, would recover. The whole question is as to the church organization entitled to the church property, and the answer is, from all law and authority, that it is the one that holds the title. The question is too plain to multiply words. When the members of the Methodist Episcopal Church, South, carried their membership elsewhere, they could not carry the house of worship, dedicated to the use of others as beneficiaries, with them; and, consequently, we think the Court charged the jury correctly upon this legal question.

6. We now come to the only question of embarrassment in this case, and that may be found in the sixth ground of error, and arises upon the charge of the Court, applied to the facts of the case, whether the relation of landlord and tenant existed, so as to authorize the proceeding instituted for the recovery of the possession. The Code, section 4005, applies "in all cases when lands or tenements shall be held and occupied by any tenant-at-will or sufferance, whether under contract of rent or not." Is this case within the provisions of that section? There is no pretence set-up that the parties are under contract for rent or by express agreement for any definite time, or by contract at all. So that the question is narrowed down to one single view. Are they tenants-at-sufferance? Our statute is broad, and the remedy it lays down summary. These defendants have not assented to anything by words, they have seemingly reserved the question of determination for the Courts. But we must take this whole case, with the acts of the parties, to determine the legal effect of their occupancy. It is beyond doubt that they

have no legal right to the possession, and that they are in possession without warrant of law.

Let us see, briefly, how they are in possession. In 1864 or 1865, they were members of the Methodist Episcopal Church, South, and were lawfully in possession. Their original possession was purely a legal one. Now, as soon as they ceased to be members of this organization, their right of possession ceased. They were out of the church, and out of the rights of the membership of the church, by their own act. And upon what terms did they remain in? It was not by legal right; nor was it by contract. Was it by sufferance of the legal owners? A party may be a tenant without being under a contract for rent. At the common law, a tenant-at-sufferance is one who comes into possession by a lawful demise and, after his term is ended, continues wrongfully and holds over. Now, by the principles of this definition, we are satisfied that the defendants below were members of the Methodist Episcopal Church, South, lawfully enjoying the possession of this church. It was not the subject matter of rent, but when they became members of the African Methodist Episcopal Church, their relation changed, and by notice to them they went into the occupancy at sufferance of the rightful owners. They were not trespassers, for they had permission; nor were they owners for they had no shadow of title. They were not tenants-at-will, for they were not in under contract. We think they were tenants-at-sufferance, liable to be turned out without notice, when the lawful owners demanded possession. And when they refused, this section of the Code was properly invoked to remove them from the possession.

Judgment affirmed.

THOMAS M. JONES, trustee, plaintiff in error, *vs.* WILLIAM H. WILTBERGER, defendant in error.

1. In a suit against a stockholder of a Savings Bank by a depositor on his individual liability for the ultimate redemption of the deposits in proportion to the amount of the stock held by him in the bank, the stockholder may defend the suit by showing that, previously to the commencement of the suit he has discharged his obligation by paying to other depositors than the plaintiff an amount equal to the full proportion his stock bears to the whole amount due the depositor.
2. Such stockholder cannot, after any one depositor has commenced suit against him on his liability, defeat said suit by paying other depositors than the plaintiff, even though he pay to the full amount of his liability. Such payment, after notice of suit, is in fraud of the plaintiff's claim, and contrary to the policy of the Act creating the liability, and if allowed would practically defeat the object of the Legislature in imposing the obligation.
3. In such suits, the production of the original evidence of deposit, or the certificate of the assignee of the bank of the indebtedness, with the oath of the assignee that the stockholder has surrendered to him such evidences of deposit, with the receipts thereon, to the stockholder, of the owners thereof, is evidence to go to the jury to prove the payment of the same by the stockholder. WARNER, J., concurred.

LOCHRANE, C. J., dissenting:

1. When Wiltberger was a stockholder to the amount of one-tenth of the capital stock *in a savings company*, and the company was insolvent and in the hands of an assignee, and Jones brought his suit against Wiltberger upon the statutory liability imposed by the charter, and upon the trial Jones showed he was a depositor and the amount due him, and Wiltberger showed that he extinguished his statutory liability by the surrender, for cancellation, to the bank, of debts due depositors to an amount greater than his proportionate liability:

Held, That Wiltberger was not bound to pay any specific sum of money, that he was bound only, to redeem his proportionate part of the debts due by the bank, and when he did this, it made no difference how he did it; when done he was discharged.

2. *Held again*, That a suit pending or instituted does not vest a legal right in the plaintiff to the recovery of the individual debt sued for; that the statutory liability to redeem is not an individual contract of suretyship with each depositor, and that the stockholder has the right, at any time before judgment, to redeem an amount of the debts equal to the obligation imposed on him by the charter, and such redemption

will operate as an extinguishment of his statutory liability, and constitute a good defense to any *action* under the charter brought or to be brought, and Wiltberger would be liable for the costs in such case.

Personal Liability of Stockholders. Tried before Judge SCHLEY. Chatham Superior Court. May Term, 1870.

In March, 1869, Jones sued Wiltberger as a stockholder of the Mechanics' Saving and Trust Association, on his personal liability, for the deposits made with the association by Jones, *cestui que trust.* It was admitted that Jones, as trustee, was a depositor of the amount sued for, had recovered judgment against the corporation for that amount, had *fi. fa.* issued, and that the sheriff returned on it *nulla bona;* that the corporate stock was $250,000 00, its indebtedness for deposits, $198,510 37, and that Wiltberger owned $25,000 00 of the stock. The defense was, that Wiltberger had redeemed as many of the debts of the corporation as he was liable for, under the personal liability clause of the charter. This clause is copied in the opinions. The association had made an assignment, and, to prove his defense, Wiltberger read a receipt by the assignee, dated June 1st, 1870, as follows:

"Received from William H. Wiltberger, stockholder in the Mechanics' Savings and Loan Association, the evidences of deposit by the depositors in said association to the amount of twenty thousand one hundred and seventy-one 46-100 dollars, and I hereby acknowledge the cancellation of the debt of said association to that extent as paid and discharged by the said William H. Wiltberger."

The assignee swore that he had satisfactory evidence of the assignment of the deposits by Wiltberger, and cancelled the debts of the association to the amount named in said receipt, as paid by Wiltberger; Wiltberger surrendered to him the evidences of the deposits, without any compensation, paid or promised. Then, without proving the handwriting of any of the depositors, Wiltberger's counsel put in evidence the

original deposit books, in each of which there was an acknowledgment that Weltberger had paid the depositor therein named, and purporting to be signed by the depositor.

They also read in evidence a written statement, by the assignee, of the amount due a certain depositor and her transfer thereon, of the claim to Wiltberger, he having paid her. Most of them were not dated; some dated in 1870. All this evidence came in over the objections of Jones' counsel. Defendant closed. The Court charged the jury, as hereafter appears, and they found for the defendant.

Jones' counsel moved for a new trial, upon the following grounds: The Court erred, 1st, in admitting the assignee's statement, that "he had satisfactory evidence," etc. 2d. In admitting said transfers and receipts without proof of the signatures. 3d. In admitting said assignee's written statement of what the association owed a depositor. 4th. In charging that, if the evidences of deposit were purchased by Wiltberger after the suit was begun, he could be allowed them in discharge of his liability as stockholder; that he had a right to purchase the evidences of deposit and give them in evidence, in discharge of his liability as stockholder; and, last, because the verdict was contrary to law, etc.

The Court refused a new trial, and that is assigned as error, on said grounds.

A. W. STONE, for plaintiff in error. The evidence was improperly admitted, because secondary, etc.: 1 Gr. Ev., secs. 440, 441, 569; Dudley's R., 64; R. Code, secs. 3707, 3784; 7 Ga. R., 356. Defense was like set-off; must exist when suit begun: R. Code, secs. 2849, 3413; 3 Wend. R., 13; 18 N. Y. R., 227.

LAW, LOVELL & FALLIGANT; JACKSON, LAWTON & BASSINGER, for defendant.

(NOTE.—Pending this cause, the Court adjourned, that the bar might attend the memorial services at the graves of the Confederate dead.)

McCAY, J.

1. We do not doubt but that the defendant in this action, Mr. Wiltberger, may defend by showing that he has discharged himself from the liability cast upon him, as a stockholder, for the ultimate redemption of the deposits; nor do we think it at all material to the plaintiff in the suit how that liability was discharged. If he has taken up, cancelled, destroyed, an amount of the deposits due, equal to his proportionate share of the whole amount, he has performed his undertaking, complied with the obligation the charter imposes. What is it to the plaintiff whether he has paid the full amount, or less than that, to each depositor? That is with him and them. The case of *Belcher vs. Wilcox*, 40th *Georgia Reports*, 391, was a bill for the distribution of assets, too, of an insolvent corporation which had been *assigned in trust*, and we held that they were to be distributed among the holders of the bills, on principles of equity. But this is suit upon a statutory liability. The parties stand upon their legal rights, and it is none of the plaintiff's business to inquire how the stockholder has settled with other depositors. All he can demand is, that he shall have discharged his proportionate share.

2. As to the other question made in the record, to-wit: that the Court below did not restrict Mr. Wiltberger, is his proof of claims discharged, to a period before the commencement of this suit, I am free to say that I have had some trouble in arriving at a conclusion satisfactory to myself. The language of the charter is as follows: "The persons composing the company shall be held and bound in their private capacity, in proportion to the number of shares held by each and every one of them, for the ultimate redemption of all deposits made with said company, and which may remain unpaid by said company during the time that any such persons shall remain stockholders."

Upon clauses very similar to this, in banks of issue, this

Court has held that the stockholder may discharge himself by paying his proportionate share of any of the outstanding bills. He is not bound to each bill-holder for his proportionate share of that bill, but any suing bill-holder may recover of any stockholder until that stockholder has paid up his proportionate share, and that stockholder so paying to the full amount of his proportion, is discharged. *Lane vs. Harris*, 16 Georgia Reports 231; *Robison vs. Bank of Darien*, 18 Georgia Reports, 109; *Belcher vs. Wilcox*, 40 Georgia Reports, 396.

I see no reason why this same rule should not apply here. It is indeed the only rule that enables a Court of law to settle the matter at all, and the only way even the parties can settle, without a resort to a general suit in equity. I think, therefore, our Courts have acted wisely, both for the creditors and the stockholders, in giving these liability clauses this interpretation.

But how far is this right to sue separately and to settle separately to go? It is at best but a construction of the law. Literally, it would require all the creditors and debtors to come together, and each to pay his share and get his money. Doubtless, too, it is in the power of any person at interest, to call all the parties at interest into a Court of Equity for a settlement. But whilst for convenience and for justice we give this construction to the statute, which permits any one of the holders to sue, and the stockholder to pay any one, we must take care that we do not fritter away the law altogether, that we do not put a weapon in the hands of the stockholder with which he may treat at his pleasure with the depositor, and force him to his own terms.

Let it be understood that it is in the power of a stockholder *after a suit is brought* to discharge himself by paying his full share to others than the plaintiff in the suit, and who will dare to sue? The stockholder may say to the depositor, "I offer you ten cents in the dollar. If you sue I will pay my proportion to others, and you will fail in your suit."

Take the case of this very plaintiff. He was not paid; he brought suit. Mr. Wiltberger has paid his proportion, much of it since the suit was brought, to others, and the plaintiff has failed. To-morrow he sues Mr. Smith; he does the same thing, and the depositor fails again, and so on and on, until he is made the tug which pulls everybody into port, but himself, and when, at last, all are in and his share must be paid, the costs and trouble have exhausted twice the demand. What sort of a liability is this? What sort of protection is this? Could *this* have been contemplated by the Legislature, or by the Courts in the construction they have given these clauses?

Were this the plain letter of the Act, as a matter of course, it would have to be followed. But, both the right of *one* to sue, and of the stockholder to pay up his proportion to such of the depositors as he pleases, are constructions put upon the law so that it may be effective for the creditor and not oppressive for the stockholder. I am aware that the logic of this construction, if carried out, leads to the position occupied by the Chief Justice, in his dissenting opinion. If it be the technical measure of his statutory liability that he may pay whom he pleases, only so that he discharges his proportionate share, then, I see nothing in the mere *bringing* of a suit by one that shall make it necessary to pay him, rather than others. But, as I understand the law, this is not, technically and accurately, the measure of his liability. The rule, that one may sue and recover, and that the stockholder may discharge whose claim he pleases, is not in the clause. It is an equitable interpretation put upon it by the Courts, in order that it may work more conveniently for both parties. And my judgment is, that the Courts, in making this interpretation, must guard it so that it will not give an unconscientious advantage to the stockholders. This construction of the rule, or rather the construction without this limitation, does give that advantage, and I cannot assent to it. My judgment is, that after any depositor or bill-holder has commenced his

suit, the defendant must see to it that the plaintiff is satisfied before he can discharge himself by paying up his proportionate share.

I see plainly enough the force of the argument; that, as the day before the suit was commenced, the stockholder might discharge himself by paying others than this particular depositor, it is giving an unusual effect to the mere bringing of the suit to make it work so as to prevent the stockholder taking the same course after suit as before. I see, too, that this, *apparently*, introduces a rule of preference between the depositors, dependent upon their bringing suit, which is not in the statute.

But as I have said, the right of one depositor to recover *all* of his deposit, or the right of the stockholder to do otherwise than to pay to each depositor his proportionate share of that deposit, is not in the statute either. It is a construction by the Courts in furtherance of the policy and intent of the statute. And my judgment is that this construction ought to be limited by the same public policy as I have suggested.

As to the preference which the rule we lay down gives to the depositor who sues, I can only say that it is a preference all *admit* to him *after* his judgment, and is perhaps a proper reward of his superior diligence. Should a question arise *between the depositors*, I am not prepared to say that any depositor or stockholder may not, in equity, call in the whole fund, and the whole indebtedness for an equitable and equal distribution.

3. As to the other points, we think, in the main, the Court below was right. The assignee is the agent of the creditors of the bank. His statement of the debts and his transactions in their liquidation, are evidence against the creditors, *prima facie*, at least. He was the proper person to take up from Mr. Wiltberger these cancelled certificates, and to judge of their cancellation. There is no charge of fraud or collusion. Indeed, these certificates are not discharged until they are delivered to the bank or its representative.

The judgment is, however, reversed by the majority of the Court, on the ground that the Court erred in holding that Wiltberger could discharge himself from the plaintiff's claim by paying, after notice of the suit, to other depositors than the plaintiff, an amount equal to his full proportionate share of all the indebtedness by the bank to depositors.

Judgment reversed.

WARNER, J., concurring.

The sixteenth section of the charter of the company declares that, "the persons composing said company, shall be held and bound in their private capacity, in proportion to the number of shares held by each and every one of them, for the ultimate redemption of all deposits made with said company, or which may remain *unpaid* by said company, during the time that any of such persons shall remain stockholders." After an assignment of the assets of the company to an assignee, and after the commencement of the suit by the plaintiff, as a depositor, against the defendant, as a stockholder, to render the amount of his deposit with the company, the defendant purchased from, or extinguished in the hands of other depositors in the company, an amount equal to the amount of stock held by him in the company, and surrendered the same to the assignee of the company, and claims to be discharged from all liability to the plaintiff, on the ground that he has redeemed an amount of deposits due by the company equal to his liability under the charter, as a stockholder. Inasmuch, as it does not appear in the record when the claims of the several depositors were purchased or extinguished by the defendant, or what he paid for the same, but having made the purchase or extinguishment thereof since the assignment of the assets of the company, and since the commencement of the suit against him, such purchase or extinguishment of the claims of other depositors, under such circumstances, is not a *redemption* of the deposits made with the company, which remain unpaid, according to the true intent and mean-

ing of the charter of the company. The true intent and meaning of the charter is that each stockholder shall be liable for the redemption of the deposits made in said company, to the amount of the number of shares held by him and the value thereof, as fixed by the charter. When the defendant shall have shown that he has, *bona fide*, redeemed the deposits of the company to that amount, including the deposit of the plaintiff now sued for, that will be such a redemption of the deposits of the company as the charter contemplates for the benefit and protection of the depositors of the company. The plaintiff had a right of action, as a depositor, against the defendant as a stockholder, at the time of the commencement of his suit, which cannot be defeated by the purchase or extinguishment of the claims of *other depositors* in the company by the defendant, *subsequent* to the commencement of such suit, as set forth in the record. The assignee of the corporation is a trustee of the assets thereof, for the benefit of the creditors of the corporation, but such assignee is not the representative of the individual stockholders in their individual capacity. By the charter of the company, *each* and *every one* of the stockholders thereof is bound in his *private* capacity for the ultimate redemption of *all* deposits made with the company in proportion to the number of shares held by him—that is to say, he is *individually* liable therefor. If a defendant was the owner of the property of the value of $20,000 00, and was individually indebted by note to several creditors for that amount, and one of those creditors should institute suit against him on one of his notes for $800, and after the commencement of such suit, that defendant should voluntarily go to his several other creditors, and pay off or extinguish his indebtedness to them to the value of his property, would the fact that he had done so constitute any *legal* defense to the action of his creditor, who had sued him on his $800 00? that is *the principle* contended for in this case by the defendant.

LOCHRANE, C. J., dissenting.

1. The facts in this case have just been recited. The question arises upon the rights of stockholders, under their statutory liability for the ultimate redemption of all deposits made with the banking company of which they were such stockholders. The sixteenth section of the Act of incorporation of the Mechanic's Saving and Loan Association, out of which this liability arose, is substantially the same in relation to the ultimate liability of stockholders as that which we find in the various charters which have been so often adjudicated by this Court. It is not our purpose to enter into any disquisition upon the law applicable to banking corporations, our object being simply to place briefly and perspicuously the summary of the doctrines and principles governing such cases. The record shows that Wiltberger owned one-tenth of the stock, the capital being $250,000 00; that the deposits were $198,310 37, making his liability to such depositors, under the section quoted, $19,837 03. Wiltberger redeemed some $20,000 00 of these deposits, taking assignments of the original books, which he surrendered to the assignee of the bank, thus surrendering the amount due by him, as such stockholder, upon his ultimate liability.

Upon the trial of the plaintiff's case, he offered in testimony, by the assignee, proof of these facts, and such books of deposits, so surrendered and cancelled, being brought in by such assignee, were referred to in his testimony. We concur in the opinion that such testimony was legally admitted. The assignee is the only legal representative of the corporation, and is, in law, the trustee of the creditors. The surrender of these books to him, and their cancellation, was an extinguishment of the debts due by the bank to the amount of over $20,000 00, and more than the ultimate liability due by him. He was sued on a statutory liability, and this proof was properly admitted to show his discharge. In the manner in which they were admitted they were not original evidence,

nor did they require proof by subscribing witnesses or the parties making the assignments; nor, in our opinion, was it material for his defense against such statutory liability to prove how or for what consideration he had procured them. He was not bound to pay any specific sum of money; he was bound to redeem his proportionate part of the debts due by the bank. If he did this, it made no difference how he did it. The simple question was, did he redeem the amount of debts he was bound to redeem? If he did, he was discharged; if he did not, he was liable. The evidence offered by him was to show he had extinguished his liability by the redemption of such an amount as, under the provisions of the charter, he was liable for; and in no more satisfactory method could this redemption be made to appear than by the surrender of the evidences of its indebtedness. If the statute imposed upon him the duty of paying the debts due depositors of the bank, then it followed, not only as a logical, but a legal consequence, that he had the right to discharge the duty imposed upon him by the law. This Court has laid down the rule, "when the charter of a bank makes each stockholder individually liable for the redemption of the bills of the bank in proportion which his stock bears to the whole capital stock of the bank, or to the whole indebtedness of the bank, a stockholder who has redeemed, by purchase or otherwise, an amount of the bills of the bank as large as his personal liability is no longer liable, and, when sued as a stockholder, he may plead that fact and tender the bills in Court as a complete defense." If this principle applied to stockholders in the redemption of bills, it applies to stockholders in banks of deposit to depositors. We have examined, carefully, the various bank decisions of this Court, and the various authorities cited in connection therewith, and feel satisfied the weight of authority sustains the propositions we have laid down.

2. The only question in this case is, "whether the institution of a suit by a depositor against a stockholder vests in

each party, by reason of such *lis pendens*, a legal right to the recovery of his individual debt as entitles him to recover against such stockholder the full amount of his individual claim. This question has invoked the necessity of examination into the rights of parties as against individual stockholders, and the consideration whether this statutory liability is in effect an individual contract of suretyship, or is an obligation imposed by the charter for the fulfillment of a duty expressed in its obligation, for the ultimate redemption of all deposits in proportion to the number of shares held. Our opinion is, that the obligation is to redeem an amount of the debts in proportion to the shares of stock, and that at any time before or after suit by each or all of such depositors, it is within the statutory right of the stockholder to extinguish his liability; and that such extinguishment or redemption of the debts due by such corporation to an amount equal to the liability of such stockholder in proportion to his shares, is a complete legal defense to the recovery of such stockholder as may have instituted such suit, and the duty to pay is no more obligatory in law to a depositor who has sued than to one who has not sued; and that even if it were an individual liability he has a right to prefer his creditors at any time before judgment. But as we do not regard this as an individual liability, the right and duty are cor-relative with the duty to extinguish and the right to extinguish by the redemption of the debts due by him in proportion to his stock, which when done and made to appear by proper proof to the Court, amounts to payment, and the plaintiff cannot recover. Nor is this rule prejudicial to the legal rights of depositors. The statute vests no individual rights by the commencement of the suit. The charter looks to no personal preference of creditors. The liability imposed is redemption; when that is accomplished the party is discharged, and may plead it as well to a suit pending as to one thereafter to be commenced. For these reasons I think the judgment of the Court below should be affirmed.

THE SOUTHERN INSURANCE AND TRUST COMPANY, plaintiff in error, *vs.* A. LEWIS & BROTHERS, defendants in error.

1. A brought his action upon a policy of insurance, and it appeared on the trial that he had erected the storehouse insured upon the land of B, under a parol contract that he was to have the title, and in consideration thereof was to erect an adjacent store for B. A went into possession under the contract, and erected his store and was building a store adjoining for B, in pursuance of his contract:

Held, That A had an insurable interest in the property, under section 2958 of the Revised Code, and that the recital in the policy of A's ownership of the storehouse insured was not a misrepresentation, under the facts in this case; and that the recital of *ownership* in a policy of insurance is not such a technical expression as amounts to warranty, under our law.

2. Where A insures property with B, who is the agent of the company, and pays B an additional per cent. on the premium on account of carpenter's work being carried on in the completion of joining building, and such fact is not expressed in the face of the policy:

Held, That this did not avoid the policy. When a building is insured and an adjoining one has some hazardous business carried on therein, though such fact increases the risk, it is not necessary to express it in the face of the policy, when it is known to the agent.

3. Where A insures property, and, in the policy, carpenter's trade being carried on within the building, is denominated hazardous, and the proof is that no carpenter's work was done within the building insured, but was being carried on, not as a trade, but for the purpose of erecting another building:

Held, Under the facts that this did not violate the conditions of the policy and render it void.

4. When on the trial the Court permitted the proof of loss to go to the jury, as evidence of the ownership:

Held, Such use of this testimony was not authorized; that the rule is, the proof of loss by claimant under his policy, may go to the jury to show his compliance with the terms of the policy, but is not evidence of ownership, loss, or value, but such must be established by proof under the rules of evidence. But as in this case the evidence is complete and uncontroverted upon the point, we do not regard it sufficient to set aside the judgment.

5. When the Judge charged the jury, in his opinion, A had an insurable interest:

Held, That this was an improper mode of presenting the case. He ought to have called the attention of the jury to the facts, and then

stated: "If you believe, etc., etc., then in the opinion of the Court, under the law, you will find that he had an insurable interest." But, under the facts in this case, we regard the statement rather as a legal conclusion, than an opinion on the facts; and as the case was clearly made out, we do not think it sufficient ground to reverse the judgment.

Insurance. Parol contract for land. Before Judge SCHLEY, Chatham Superior Court. May Term, 1870.

In February, 1867, A. Lewis & Brothers took a policy of insurance, from plaintiff in error, upon a building, described in the policy as "owned and occupied by the assured as a *store*." In the policy it was stipulated, "if the above mentioned premises, at any time during the period for which this policy would otherwise continue in force, shall be used for the purpose of carrying on therein any trade or occupation, denominated hazardous, extra-hazardous, or specially hazardous, from thenceforth this policy shall be of no force or effect." And "this policy is made and accepted in reference to the terms and conditions herein contained and annexed, which are declared to be a part of this contract."

Among the conditions referred to, were various trades, occupations, etc., denominated hazardous, but carpenter's trade was not named therein. But adjoining this list was a memorandum, naming various other trades, including that of carpenter's, with a statement that *these* would be insured at special rates of premium. The policy also required that persons sustaining loss should give notice and make proof, "showing the ownership of the property insured," etc.

The property was burned. The assured made the proof, calling themselves therein "owners," etc. The company refused to pay and were sued upon the policy. The company pleaded the general issue. Plaintiff's counsel read in evidence the policy and proof of loss. The company's agent testified that he made the insurance at Thomaston, Georgia, and received, as a premium, a sum "including one-half per

cent. for carpenter's risk, though not so expressed in the policy."

He proved the loss by fire, and the value of the building. He further testified, that he owned the land, partly covered by this building, but agreed, verbally, with the assured that if they would complete him a certain building thereon, ready for business in the fall of 1867, he would convey to them the land not covered by *his* building. Their's was the middle building—his a side tenement. No carpenter's work was done in the insured building after the policy was taken out, but the assured did have carpenter's work done in the side tenements up to the time of the fire.

The plaintiffs having closed their case, defendant's counsel moved for a non-suit, on the following grounds: 1st. Because the evidence did not show that the plaintiffs had an insurable interest on the house; and, 2d. If they had an insurable interest, it was not such ownership as they warranted they had, and, in either case, they could not recover.

This motion was overruled, and the defendant excepted. The case was then submitted to the jury, under the charge of the Court, with such objections as to evidence, and with such requests, in writing, for the Court to charge, as appear in the grounds for motion for a new trial; and the jury rendered a verdict for the plaintiffs for the sum of $2,000 00, with interest from the 27th day of July, 1867, and costs of suit.

The defendant thereupon moved for a new trial, on the following grounds, to-wit: 1st. Because the Judge, on a motion for a non-suit, made by defendant's counsel, after plaintiffs closed their testimony, erred in ruling that the proof of loss which the plaintiffs furnished the defendant, as required by the policy, was competent evidence for the jury to consider in connection with the other testimony, to find the fact of ownership in the plaintiffs. 2d. In allowing (after objection made,) said proof of loss to go to the jury for any other purpose than to show that the plaintiffs had complied with the policy, which required them to furnish such proof within

sixty days after the fire or loss. 3d. In admitting (after objection made by defendant,) that part of Bethel's testimony, which set forth a verbal agreement with plaintiffs, made before the policy was issued, allowing them to carry on carpenter's work, when the policy (the written contract,) was silent as to such extra risk. 4th. In permitting the plaintiffs' counsel, against the objection raised by defendant's counsel, to comment to the jury on the proof of loss, as evidence, in itself, of the fact, that plaintiffs owned the house insured, and of the value and destruction of the same. 5th. In refusing to charge the jury, as requested by defendant's counsel, that if Lewis & Brothers had to complete a house for Bethel before they would be entitled to the land, then Bethel received no consideration, unless the house was completed, and, until completed, Lewis & Brothers acquired no insurable interest therein. 6th. Because the Court, in lieu of the above request, charged the jury as follows: "If you find that Lewis & Brothers had even commenced the house for Bethel, then they had an insurable interest in the house which they had erected on Bethel's land." 7th. Because the Judge erred in charging the jury that, in his opinion, Lewis & Brothers had an insurable interest in the house on Bethel's land, and in repeating said expression to the jury. 8th. Because the Judge erred in charging the jury as follows: "If you find that the carpenter's work was carried on after the policy was issued, with the knowledge of Bethel, the defendant's agent, the defendant cannot now avail itself of that fact, to avoid its liability on the policy, on the ground that the risk was thus increased." 9th. Because the jury found contrary to law. 10th. Because the jury found contrary to evidence. 11th. Because there is no legal evidence to support the verdict.

The Court refused a new trial, and error is assigned on said grounds.

T. M. NORWOOD, for plaintiff in error.

HARTRIDGE & CHISOLM, for defendants.

The Southern Insurance and Trust Company *vs.* Lewis & Brothers.

LOCHRANE, C. J.

This was an action of assumpsit brought by Lewis & Brothers against the Southern Insurance and Trust Company, upon a policy issued by them on a certain store-house in Thomaston, for $2,000 00. The policy describes the property as one single-story wood building, owned and ocupied by the assured as a store. The policy provides, that should the property be used for the purpose of carrying on therein any trade or ocupation, etc., denominated hazardous, it should be void; and by reference to the conditions expressed in the policy, certain trades therein mentioned, are denominated extra-hazardous, among which are "carpenter's." It appears from the record of the trial, that this house was destroyed by fire, and that it was worth more than the amount for which it was insured; that it was ocupied as a store by the parties, and it further appears that Thomas F. Bethel, the agent of the company with whom the policy was taken out, was the owner of the land upon which the building was situated, and that he had agreed to make the plaintiffs below a title to the land upon their erecting for him a building of certain dimensions upon a part of the said property. The evidence discloses the fact that, in pursuance of this parol agreement, Lewis & Brothers had erected the store, the subject matter of this insurance and suit, and were, in the execution of their contract, erecting the building under their agreement for Bethel; and it further appears that the carpenters were at work in the erection of this building adjacent to the one that was destroyed by fire, at the time of such fire, there being no carpenter's work done in the building covered by the policy of insurance, after such policy had been issued. It also appeared from the evidence, that the premium paid for insurance was three per cent. including one-half of one per cent, not expressed in the policy, for the carpenter's work.

Upon the introduction of this testimony, which contained substantially the facts, defendant moved for a non-suit upon

the ground that the plaintiffs had not an insurable interest in the house, and if they had, it was not such an ownership as they warranted, which motion the Court overruled, and this constitutes the first exception necessary to be adjudicated. We think the Court below was right, and the reasons for our opinion will appear in the further decision of the question in this case.

After the non-suit was refused, the case was submitted to the jury, and they found a verdict for the plaintiffs. A motion was made for a new trial upon several grounds, which was overruled by the Court, and that decision we will briefly dispose of in connection with the various grounds of error alleged.

1. The first and main question of this case is, whether the parties, under the facts, had an insurable interest, and if such interest came within the recital of the policy as to *ownership* of the building and store. Section 2753 of the Code says, "to sustain any contract of insurance, it must appear that the assured has some interest in the property, or event insured, and such as he has represented himself to have. A slight or contingent interest is sufficient, whether legal or equitable." Under the proof, it is clear that the parties had an interest in the property insured, more than a slight or contingent interest, but an unquestioned equitable interest and ownership of the building; and, in any view we may take, the equitable title to the land, neither in the nature nor extent nor character of the risk, would it be changed by the question of such ownership. Bethel entered into an agreement with Lewis and Brothers, to grant them the land on which this building was erected, in consideration of their erecting for him a building upon an adjacent lot. In pursuance of this agreement, they entered upon the property, erected this store, and were in the actual completion of the building agreed to be erected for Bethel. Their title to this store was one in which the Courts of Equity would have protected them. Bethel could neither have recovered the premises in ejectment, nor could

he have claimed the building, or removed it, or by any process, either in law or equity, have interferred with their right, title and possession thereto. Besides, Bethel himself was the agent of the company; he knew all the facts and their recital of ownership would have estopped him from claiming title thereto, and there could be none other, either at law or equity, competent to assert it. Again, the recital of ownership in a policy of insurance is not such a technical expression as amounts to a warranty. Parties holding bond for titles may be regarded owners, even where the purchase-money is not all paid. The good faith of the representation is the main test within the provisions of section 2760 of the Code of this State. And we may here remark that the law of insurance embodied in the Code contains the essential principles controlling questions arising under such policies, and is a clear expression of the law upon this subject. We, therefore, hold that these parties had an insurable interest under the law of this State.

2. Another objection urged by counsel is, "the carpenter's work carried on by Lewis & Brothers in the adjoining tenement, without provision, rendered it void." We see no force in this objection. The policy denominates as hazardous "carpenter's trade being carried on within the building insured." The evidence here is that no such business was carried on, and the objection fails as a matter of fact. Lewis & Brothers were completing the adjacent store, and the necessary carpenter's work was being carried on in the accomplishment of this purpose; but this did not void the policy, either in its terms or conditions.

3. It was not carrying on the carpenter's trade in the building insured, and stands precisely as where an insurance company takes a risk upon one building used for one purpose, contiguous to another in which there is some trade carried on that may be hazardous, and for which, as under the proof in this case, an additional per centage on the premium was charged. Besides this fact was known to the agent of

the company at the time of the insurance, and he charged the extra premium for such additional risk; and we may remark that there is a wide distinction between carrying on a carpenter's trade in a building and the use of such carpenter's work merely, as may be called in requisition to complete a building or repairs. But as there was no carpenter's work or trade carried on in the insured building, it is clear that such carpenter's work in an adjacent building did not bar the plaintiff's recovery. And we think the Court below did not err in its charge to the jury, based upon this view of the law; nor do we think the jury found contrary to the law or the evidence under the facts in this case.

4. The fourth ground of error alleged is, that the Court erred in allowing the proof of loss to go to the jury for any other purpose than to show the plaintiffs had complied with the policy, and in permitting plaintiff's counsel to comment to the jury on the proof of loss as evidence, in itself, of the fact of the plaintiff's ownership of the house insured and the value and destruction of the same. It is difficult from this record to ascertain exactly the precise *status* of the case as presented to the Court. These averments appear in the motion for a new trial, certified to by the Judge as having transpired in the case, and we will so treat them. The alleged error embraces a matter of practice as well as a principle of evidence. One of the conditions of the policy is, plaintiffs shall furnish proof of their loss to the company, and in case of suit brought, we hold such proof is held strictly to the effect of showing his compliance with his contract expressed in the policy, but is not in itself evidence either of ownership or destruction, or of the value of goods destroyed. These questions put in issue by the pleadings must be supported by the other proof, subject to cross-examination upon the trial, but as to how far such proof may be used in argument by counsel to the jury, as circumstances of ownership connected with the recital of the policy, is a matter which, when supported by

other evidence which is independent and *aliunde*, is difficult to prescribe.

The company receives the money from the party admitted to have an insurable interest, recognizes him and contracts with him, as the owner, invokes such proof from him, by its conditions, and when offered in evidence to show compliance with the policy, it is for this purpose admissible. But, as we have previously stated, it is not evidence of the facts; and while it may be taken in connection with the policy as a circumstance upon which we are not prepared to say counsel could not comment, yet it is not such proof of ownership or of loss, as the Court should charge was evidence in itself of either. But in this case the *aliunde* testimony on these points was ample and uncontroverted, and though the language of the Court was, in our opinion, erroneous, still, under the well settled adjudication of this Court, it was not such an error as could have misled the jury or would invoke this Court to grant a new trial.

5. And the charge of the Judge, stating "in his opinion Lewis & Brothers had an insurable interest in the house on Bethel's land," was not the proper way to have charged the jury. He ought to have stated: "If you believe from the evidence that Bethel entered into a parol contract with Lewis & Brothers to grant them this land upon which their store was erected, in consideration that they were to build for him a new house on an adjoining lot, and, in pursuance of such contract, they entered upon the land and built their store, and were in process of completing, in terms of their contract, the store for Bethel, in the opinion of the Court, you will find they had an insurable interest in the house which they had erected on said land." But, as this question was before the Court upon a motion for a non-suit, and was made out clearly by the testimony, and submitted to the jury without any evidence by the defendant, we do not think, under the circumstances and proof in this case, the statement of the Judge to the jury in the manner in which it was charged, was such

an expression of opinion as to what had been proven, (it being rather a legal conclusion than an opinion upon facts,) as would justify this Court in granting a new trial; and we therefore affirm the judgment of the Court below.

Judgment affirmed.

JOHN R. BURCH *et al.*, plaintiffs in error, *vs.* THE MAYOR AND ALDERMAN OF SAVANNAH, defendant in error.

A retail dealer in goods, wares and merchandise, who is also a retailer of spirituous liquors, and who has paid his license as such retailer of spirituous liquors, to the corporation of the city of Savannah, is not exempt from the special tax laid by the city of Savannah upon retailers of spirituous liquors, nor is such special tax upon retail dealers generally an illegal tax under the Constitution and laws of the State.

Taxation. Municipal Corporations. Before Judge SCHLEY. Chatham county. August 1870.

Burch *et al.*, in April, A. D., 1870, filed their bill in equity against the Mayor and Aldermen of the City of Savannah as follows:

"The Mayor and Aldermen of the City of Savannah, by Ordinance passed the 22d day of December, 1869, ordained that on and after the first day of January, 1870, taxes and revenue for the support of the government of the city of Savannah, and for the advantage and benefit of the inhabitants thereof, shall be assessed, levied and raised, at and after certain rates therein specified. And amongst other other things specified in the third section of the said ordinance, it was ordained, that every retail dealer shall pay a specific tax to the said city of $25 00 exclusive of liquor license. And by the first section of said ordinance, it was provided, that, on all gross sales, of every kind of goods, wares and merchandise, there should be collected for the benefit of the

city, as aforesaid, the sum of one half of one per centum. And by the sixth section of the same, the price of a license to retail spirituous liquors for one year, was fixed at the sum of $125 00. Complainants are retail dealers of merchandise in said city, and are retail dealers of spirituous liquors; they respectively carry on the whole of their business at the same place and under one roof, and the business of retailing spirituous liquors and retailing other merchandise, is not separate.

"And they have respectively paid to the said city the price of a retail license for the sale of spirituous liquors, for the year 1870, and license has been issued to them, and they have paid also the tax, of one half of one per centum, on the sales of merchandise by them made, as required by the ordinance.

"And they have not been required by the officers of the city government to pay the specific tax provided for in the third section of the said ordinance, until the 18th day of the present month, when they were informed by the Marshal of the city, acting under the direction of the said Mayor and Aldermen, that he was ordered to notify them that if the said specific tax should not be paid by the 23d of the present month, he would be compelled to place them upon the information docket, for a violation of the said ordinance. In other words, the said Mayor and Aldermen were about to proceed to enforce the ordinance for the collection of the specific tax, and by a proceeding before the Police Court, to punish complainants for a failure to pay the said specific tax. Said ordinance, so far as it authorizes the collection of the said specific tax, in addition to the other taxes above named, is unconstitutional and violative of law," etc.

The bill proceeded in the usual form, and prayed for an injunction to restrain the said Mayor and Aldermen from enforcing the ordinance for the specific tax aforesaid, and an injunction was granted as prayed for.

During the May Term of the said Superior Court, A. D.,

1870, the "Mayor and Aldermen of the City of Savannah," moved to dissolve the said injunction and dimiss the bill, and upon argument had, the bill was dismissed for want of equity. This is assigned as error.

RUFUS E. LESTER, for plaintiffs in error. City can only tax by express grant: 8 Ga. R., 20; 41st, 21. Legislation limited by Constitution: 8 Ga. R., 28. Tax Acts construed in favor of citizen: 8 Ga. R., 30; 4 Mass. R., 145; 2 Cow. R., 42; 9 Pick. R., 414; 3 Story R., 369. Tax must be *ad valorem:* Art. I., sec. 27, Constitution; 41 Ga. R., 21. Savannah has no power to tax occupations: R. Code, sec. 4749.

E. J. HARDEN; HARTRIDGE & CHISOLM, for defendant. This tax properly laid: R. Code, sec. 4749; 36 Ga. R., 460. Liquor dealing distinct business: R. Code, secs. 4761, 4481, 1435, 1438. Tax on occupations legal: Acts 1868, 152, 153; Acts 1869, 159.

McCAY, J.

The license fee for retailing liquors is, in no proper sense, a tax. Its object is not to raise revenue. It has, for many years, been thought that this business was one dangerous to the public peace and the public morals, and it has been the uniform practice of the country to subject it to regulations; require license from some public functionary before it is engaged in, and to punish, as a crime, the pursuit of it without the license. The license is part of the *police regulations* of the country, and the fee is rather intended to prevent the indiscriminate opening of such establishments than to raise revenue by taxation. This power to regulate the sale of liquor is very generally committed, now, to the towns and cities, and this power is specially delegated to the City of Savannah: Revised Code, 4761. Nor are we able to see why a license to retail liquor should be held to include a license to retail other things than liquor. As we understand the

statements in this bill, these parties do not pretend that they are simply liquor dealers. They admit that they are retail dealers of other things as well as liquors. We can see, therefore, *nothing* in the fact that they have paid the liquor license. As we have said, that is not a tax—it is a police regulation, so specially granted, by the law, to the city. Section 4761 of the Revised Code provides that, the said Mayor and Aldermen shall have the control and *regulation* of all shops, stores, taverns and bar-rooms, and the *regulation* of tavern licenses and licenses to retail liquors. But it is said that these parties have paid, first, a poll tax, second, a tax on their gross sales; and that this tax upon their trade, occupation, or business, as retailers, is a repetition of one or the other of these taxes.

There is no doubt but that, *under the city charter*, this *tax* upon the occupation of a retailer may be laid. This Court so expressly decided in 36th Georgia Reports, 460, in the case of *Charlton vs. The Mayor and Aldermen of Savannah.* Section 4749 of the Code provides that, they may tax "the inhabitants of the city, those who hold taxable property within the same," and "those who *transact, or offer to transact, business therein.*" They may, by this section, also tax real and personal property, capital invested in said city, stocks in money corporations, choses-in-action, income and commissions derived from the pursuit of any trade, profession, faculty, or calling, dividends, bank, insurance, express, and other agencies, and all *other property* or *sources of profit*, not expressly prohibited, or exempt by State law, or competent authority of the United States. Nor do we see why the city may not tax the calling, as well as the income from the calling. It is usual for governments so to do. The United States Tax Laws are full of such instances. Attorneys, doctors, merchants, bankers, etc., all pay a special tax, as well as a tax upon their sales and their income. The right of taxation, in the Legislature, is without limit, except as provided in the Constitution. It is not a power specially granted; it

is assumed to exist, and is *limited* by special clauses. We can see no reason, in the *nature of things*, why a tax may not be laid upon the land, and upon the crop, on the horse, and on the work of the horse, on the man, and on the income of the man; unless there be some special limitation of this power by the Constitution.

This Court has held that the limitations upon the taxing power, in the Constitution, apply as well to cities and towns as to the Legislature, and that all taxes upon *property*, when laid by a city, must be laid *ad valorem*, and be uniform upon all species of property taxed. Is this a tax upon property? Very clearly, not. It is a tax upon occupation or employment, and has no reference to property. If it be objectionable at all to the constitutional limitations, it comes more nearly within the prohibition of section 29 of Article I., of the Constitution, which prohibits a poll tax, except for educational purposes, and limits even that to $1 00. But taxes upon professions and occupations of skill, as taxes upon lawyers, doctors, photographists, auctioneers, bank agents, wholesale and retail dealers, peddlers, etc., have never been, in this State, classed as poll taxes. The poll tax has always been required of each of them, notwithstanding the other tax. If the Legislature were to attempt, by taxing *all occupations*, practically, to annul the prohibition against a poll tax, the question made might arise. But there is a clear distinction between a tax upon certain specified businesses, where the skill of the operator is a source of profit, or where the public are appealed to for patronage and protection of a fixed and regular business, and a tax covering all persons, whatever may be their occupation. Necessarily, in the construction of the Constitution, we are to take words as they have, for years past, been used and understood in Legislative proceedings in this State.

The Code, which was before the Convention, and was adopted by it, as the law, makes the distinction we have alluded to, very clearly. It taxes every person twenty-five

cents: Section 806, paragraph 3. This is the poll tax. It, then, by various paragraphs, taxes lawyers, doctors, etc.: Section 806, paragraphs 1, 2, 4, 5, 6, 7, 8, 9. So, too, did the Legislatures of 1868 and 1869. And such has always been a distinction, kept up in this State. It is founded, too, in fact. The skill, or education, or tact, which is the source of profit in these occupations, is clearly distinguishable from that capacity which is in every man to work for his support with the hands which God has given him.

Judgment affirmed.

AMHERST W. STONE, plaintiff in error, *vs.* HENRY S. WETMORE, defendant in error.

Pending a controversy, under a *quo warranto*, against one in possession of a public office, a Court of Equity has no jurisdiction to enjoin the *de facto* officer from receiving the fees of the office, nor to appoint a Receiver to take and hold the same same until the controversy is settled.

Quo Warranto. Injunction, etc. Before Judge SCHLEY. Chatham County. Chambers. March, 1871.

Stone averred that he was the Ordinary of Chatham county, duly commissioned, in possession of the records and exercising the functions of the office; that during his temporary absence from Savannah, Wetmore, without authority of law, took possession of said office and records, and is assuming to act as Ordinary and is receiving the fees of the office, which are worth, say, $100 00 per week. He filed a petition for *quo warranto* to eject Wetmore, but the Court refused to grant it, and that cause is before this Court upon writ of error.

As some time must elapse before this cause can be finally disposed of, and as Wetmore is insolvent, he prayed injunc-

tion against his receiving such fees, and that they be paid to a Receiver, to be held subject to the final decision of this controversy. This bill was demurred to, and the Court refused to grant any part of the prayer. That is assigned as error.

W. DOUGHERTY, A. SLOAN, A. W. STONE, for plaintiff in error.

HARTRIDGE & CHISOLM, JACKSON, LAWTON & BASSINGER, for defendant

McCAY, J.

If the defendant in this case is an intruder into the office, attempting without any show of right to exercise its duties and receive its fees, if he is, in fact, a mere trespasser, with no right to claim its proceeds, then any one who pays them to him, does so at his peril; his acts are all void, the receipt of the fees cannot hurt the complainant.

But, if, as must be assumed, in order to give any show of foundation for this bill, he is a *de facto* officer, performing the duties of the position under such circumstances as justify him in demanding and receiving the fees, we know of no authority to justify a Court of Equity in interferring. To do so, would practically decide the dispute as to right to the office.

For purposes of public policy, it is a settled rule that an officer *de facto* may do legal acts, though his title to the office may be defective: Code, section 120. The same public policy which establishes this rule, prevents the Courts from interferring to disturb the *de facto* officer in the receipt of the fees. If he works he must live. The law authorizes him to demand his fees on the performance of the work. The practice is universal for the Ordinary to demand his fees, and not to deliver to the parties their letters, certificates, etc., until their fees are paid. We should hesitate to hold an Ordinary

bound to do the duties of his office for one who failed or refused to pay him the fees fixed by law.

To appoint a Receiver to take the fees would be to authorize the Ordinary to refuse to perform the duties of his office. Suppose it were necessary, as it sometimes is, to enforce the collection of fees by execution or by attachment, is the Receiver to do this? Is the Ordinary to issue the process in the name of the Receiver? Is the Receiver to sit by and take the fee for every marriage license, every set of letters of administration, every order or certificate the Ordinary may grant? Or is the Ordinary, when he receives the fees, to pay them over to the Receiver? It seems to us that to set up such a power, in a Court of Chancery, is to assume a jurisdiction over constitutional functionaries that is contrary to law, contrary to public policy, and contrary to all the authorities: 9 Paige R., 507; Cooper vs. Reilly, 2 Sim., 561; 10 Beavan, 544, 545; 9 Paige, 507; 2 Paige, 333; Edwards on Receivers, 57.

In England, as a general rule, a Receiver will only be appointed when there is a suit pending—a controversy in the Court: 1 Atkins, 578—except in some special cases, as in protection of the interests of lunatics and infants, and when the Court interferes as the general guardian of that class of persons. Here, there is no controversy in the Court. The proceeding is at law, over a legal matter, and depending on legal, not equitable, rights. The power to appoint a Receiver, provided for in section 265 of the Code, is not to the Chancellor, but to the Judge of the Superior Court.

Upon the whole, we are satisfied that the demurrer to this bill was properly sustained.

Judgment affirmed.

HENRY S. WIMBERLY, plaintiff in error, *vs.* R. A. BROWN *et al.*, defendants in error.

Where A, as administrator of C, filed his bill of interpleader, in which he alleged his intestate left property to which he held bond for titles from Collier, that the property had been sold and the fund arising therefrom is claimed by several persons who allege their priorities, who were made parties, and on the hearing it appeared that one of the claimants held a judgment lien against the vendor, and the main question was whether a transferee of the notes given for the purchase-money by such vendor was entitled to priority over said judgment, etc.:

Held, Under the facts in this case, the verdict of the jury, decreeing a good title to the purchaser upon his full compliance with the terms of sale, and in favor of the administrator for his actual expenditures upon the property, and for administration fees and reasonable counsel fees, was correct. But it was error to apply the balance of the proceeds arising from the purchase-money to the payment of the notes transferred by the vendor in preference to the judgment lien against such vendor; and we direct the decree to be so entered as to apply the balance first to the payment of such judgment lien.

Lien of Judgments and of Vendors. Before Judge CLARK. Dougherty Superior Court. June, 1870.

So much of this proceeding as is needful for an understanding of the opinion, is as follows: Cargile filed his bill containing the following averments: In January, 1865, S. S. Crawford died in said county, intestate, and, in default of other administration, it was cast upon him, he being Clerk of the Superior Court. His household furniture, etc., were assigned to the widow for her year's support, and $200 00 was assigned to her in lieu of dower. Crawford left no other property but a house and lot in Albany. He had continuously occupied said premises since 1858, and Cargile did not doubt that they were his, though he could find no writing showing his title thereto. The premises needed repairing to fit them for sale, etc., and Cargile advanced the money to make these repairs. The rent of the property, *ad interim*,

had partly repaid these outlays, leaving a balance of say, $121 00 due Cargile.

When Cargile was about procuring an order to sell said property to pay Crawford's debts, he was informed that Collier had sold said land to Crawford, giving him a bond for titles, and taking his notes for the price. But he could find no bond, and Collier says he has lost the note. He agreed with Collier that he would establish the bond for titles, and that Collier should establish the note, that he would sell the land and first pay Collier the sum due him for balance of purchase-money, so that the purchaser at the administrator's sale would get a good title. Accordingly, Cargile sold said land in May, 1867, at regular administrator's sale for one-half cash and the balance on credit. Brown bid off the land at $1,000 00, gave his draft on Rust & Johnson for $500 00, which they accepted, and gave his note for $500 00, with Rust & Johnson as security, in compliance with his bid. But Collier now claims $750 00 as balance due on his notes for purchase-money, whereas Cargile had understood the amount to be but about $200 00. Because Cargile will not consent to pay the $750 00 Collier will not make a deed to the land, and because he will not, Rust & Johnson and Brown refuse to pay said draft and note. They also refuse to pay Cargile because Wimberly claims a lien on said land. In 1856 or 1857, Wimberly obtained a judgment at common law against Collier, from which Collier appealed, pending which appeal Collier sold said land to Crawford. Wimberly obtained a final judgment in said cause in December, 1866, against Collier, and now claims that said land is subject to the lien of said judgment. This judgment is for more than the house and lot are worth. Cargile claims that the Statute of limitations protects the land from that lien. Besides, one Chafin has a small judgment, obtained in April, 1866, DeGraffenried holds another, obtained in January 1861, and Fears another obtained in 1860, all against Crawford. Crawford also owes other debts not in judgment. Because of the

insolvency of the estate and the difficulty presented by said facts, he prayed that all of said parties be made defendants to the bill, that the exact amount due to Collier be ascertained, that Brown and Rust & Johnson be decreed to pay that sum, and thus make the title in Brown good, that the lien against Collier be decreed never to be a lien on these premises, and that the balance of the fund be appropriated according to law, *first* paying his expenses of administration, and the attorney's fees for this bill.

On the trial, Cargile testified to his claims as set forth in the bill. The record, and judgment of Wimberly against Collier was shown, as stated. Mr. Oliver then testified that he held a note in favor of DeGraffenreid, against Collier, and Collier gave him Crawford's note for $750 00 for said purchase-money, as collateral security therefor, instructing him to collect this note from Crawford, pay Collier's note to DeGraffenreid, and send him, Collier, the balance of Crawford's note. Wimberly's counsel objected to this evidence, upon the ground that Wimberly's lien was older than Collier's sale to Crawford, and that no contract made by Collier, after said lien attached, could affect said lien. The objection was overruled.

All other questions being waived, and no issues of *fact* existing as to the *mode* of distribution, the Court was asked to instruct the jury how to find. He instructed them to pay the administrator and the attorney's fees, then pay Collier's balance of purchase-money to DeGraffenreid, till his debt was paid, and the remainder to Collier, and the surplus to Crawford's children, who had claimed it, under the Homestead Act. To raise this fund, Brown's obligations were to be paid, and Cargile was to make Brown a title, and Wimberly's *fi. fa.* was to be perpetually enjoined. The decree was taken accordingly.

Wimberly's counsel excepted to said directions, and assigns them as error.

H. MORGAN, for plaintiff in error.

G. J. WRIGHT, for defendants.

LOCHRANE, C. J.

This was a bill brought by Cargile, as administrator of Crawford, showing that his intestate left property in the city of Albany, to which it appeared he held bond for title from one N. W. Collier, for which his notes were outstanding. The property was sold at administrator's sale, and was purchased by Brown, who complied with the terms of the sale, and the fund now due and arising from such sale is the subject matter of this controversy. The notes outstanding for the purchase-money are about $700 00, and it further appears that Wimberly, the plaintiff in error, claims a lien of judgment obtained at common law, in 1856 or 1857, upon which an appeal has been entered, and final judgment obtained against said Collier. The bill makes the various creditors, of whom there are outstanding many and for various amounts, parties, requiring them to come into Court and adjudicate their said claims according to their priorities. The bill also alleges certain amounts due to the administrator for actual expenses paid out upon the property, and prays a perpetual injunction against the inforcement of Wimberly's *fi. fa.*, upon the ground that Collier had aliened a large amount of other property since the sale of the property in dispute. Upon the final hearing of the case, the jury found a decretal verdict requiring Brown to pay the purchase-money and interest; also, decreed the payment of the amount due the administrator for expenses and such compensation as he was entitled to, as such administrator, first to be discharged out of said fund; next, that he be paid his reasonable expenses for counsel fees in and about the litigation, and that the balance be paid to the notes for the purchase-money, and then to the *fi. fa.* in favor of Wimberly.

In the opinion we entertain of this case, we hold that the verdict of the jury under the facts was correct, in part, so far as it found in favor of decreeing a title to Brown to the premises in dispute upon his compliance with the terms of sale, and upon full payment of the principal and interest due to the administrator; and also in finding that the amounts due to such administrator for his expenditures, administration fees, and reasonable attorney's fees, to be fixed by the Court, be paid; but the Court erred in sustaining such verdict applying the balance of the proceeds of the sale to the notes due Collier as a priority over the lien of the judgment held by Wimberly. And we direct that the decree in this case be so moulded as to pay the balance over to the extinguishment of this *fi. fa.* The lien of this judgment at common law, pending the appeal attached to all property belonging to Collier at the time of its rendition, so far as to prevent its alienation. And inasmuch as the title remained in Collier, his transfer of the notes due for the purchase-money did not give such note by such transfer as collaterals, a priority over such judgment fixed by its rendition at common law. As to the rights or equities in the alienation of other property by Collier, we are not called upon to decide, as such purchasers are not parties to this bill, and their respective rights not in controversy before us. In the case made, the lien of judgment upon this property, held under bonds for titles by Crawford, was not displaced by the sale of Collier to Crawford, nor could it give to the notes given for the purchase-money a priority over such lien of judgment.

Judgment affirmed.

Braswell *vs.* The State of Georgia.

NATHAN BRASWELL, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. When, in a trial for murder, the defendant offered testimony in relation to the character of the house (being a house of ill-fame,) where the homicide was committed, which was rejected by the Court:

Held, That this was not error, as, under the facts, it was not relevant to the issue in the case.

2. When the Judge refused to charge the jury: "If the deceased said the prisoner stole the lamp, and deceased called him a damned liar, and deceased rose up and put his hand in his pocket and advanced toward defendant, that such conduct was sufficient to excite the fears of a reasonable man:"

Held, That this was not error; for such question was one for the jury to find, upon all the proof in the case.

3. When the Court gave the converse of this proposition in charge, reciting the facts, but not all the facts, which showed the intent, whether the act was done by malice, and concluded by telling the jury, if they found the facts recited to be true, the case was murder:

Held, That this was error in the Court, and not the proper manner of presenting the question to the jury for their adjudication, under the law of this State.

4. When the facts of the case show clearly that the *act* of the killing was without any legal provocation, and, in fact, constituted the crime of murder, under the law:

Held, That this Court will not interfere to set aside the verdict for a charge of the Court, though expressed in language too strong against the accused, if, from all the evidence, this Court is satisfied with the verdict.

Criminal Law. Murder. Tried before Judge CLARKE. Dougherty Superior Court. June, 1870.

Braswell was charged with having murdered one Lockley with a gun. A physician testified for the State, that Lockley died on the day stated, from a gunshot wound in his breast. On cross-examination, he said that the character of the women at the house where Lockley was killed "was none of the best." Another witness for the State gave this account of the killing: Witness and a woman named Hickerty, were present at her house, and deceased was there, about four feet from him, sitting down. Prisoner came to the door, and

Polly Kerbro stepped up to the door and asked deceased if prisoner was not the man who stole his lamp. Prisoner, at that time, was outside the door. Deceased said he was the man who stole the lamp. Prisoner was at the door, and said if deceased said he stole the lamp, he was a damned liar. Deceased rose, ran his right hand in his right pocket, and prisoner stepped in on the floor and shot deceased immediately. The pistol was not more than two feet from deceased when prisoner fired it, and deceased's hand was then in his pocket, but he drew no weapon. Prisoner ran. It was about eight or nine o'clock, P. M.; there was a light in the fire-place. The house was a double house. Polly lived in one end and Hickerty in the other. Another witness gave substantially the same version of the affair. The State closed.

During the examination, defendant's counsel asked the State's witness if said house was not a house of ill-fame, kept by white women for the accommodation of whites and blacks, and whether deceased and his associates frequented them. But the Court would not allow the question answered. The requests to charge and the charge, as given, appear in the motion for new trial. Defendant was found guilty of murder. His counsel moved for a rule *nisi* for a new trial upon the following grounds:

1st. The Court erred in rejecting evidence of the character of the house.

2d. The Court erred in refusing to charge that, if deceased said that prisoner stole the lamp, and deceased called him a damned liar, and deceased rose up and put his hand into his pocket and advanced towards defendant, such conduct was sufficient to excite the fears of a reasonable man; and in charging that such facts were not sufficient to excite the fears of a reasonable man; that if deceased said defendant stole the lamp and defendant called him a damned liar, and deceased rose up and put his hand in his pocket, and defendant, advancing with a drawn pistol in his hand, immediately shot deceased and death ensued, it was murder.

3. The Court erred in charging: Malice is implied in all cases where the slayer takes life for words, threats, menaces, etc.; as if A call B a rogue, and B shoots A down on the spot, without other provocation, it is malice.

The Court refused to grant the rule *nisi*, and this refusal and said averred errors are the grounds relied upon here.

D. H. POPE, GEORGE KIMBROUGH, by S. B. SPENCER, for plaintiff in error.

R. H. WHITELY, by E. P. HOWELL and the REPORTER, for the State.

LOCHRANE, C. J.

1. This was an indictment for murder, in Dougherty Superior Court, and a verdict of guilty and motion for a new trial. The first ground of error is predicated upon the refusal of the Judge to admit evidence in relation to the character of the house and its inhabitants, where the homicide took place. In the opinion of the Court this evidence was not material or pertinent to the issue. Conceding it to be a house of ill-fame, it had nothing to do with the guilt or innocence of the prisoner. If parties frequent houses of disreputable character, or place themselves in the association of their inmates, the character of the houses is no excuse for any act of crime or violation of law committed therein; except such act grows out of jealousy, conduct or connection with parties therein, and is material to show the feeling of the parties in immediate connection with the homicide. Under the facts in this case, the character of the house or connection with its inmates had nothing to do with the transaction.

2. The second ground is the refusal of the Judge to charge: "That, if deceased said the prisoner stole the lamp, and defendant called him a damned liar, and deceased rose up and put his hand in his pocket and advanced toward defendant, such conduct was sufficient to excite the fears of a reason-

able man." We do not think the Court erred in refusing this charge. It was the province of the jury to determine whether the acts of the deceased were, or were not, sufficient to excite such reasonable fears as would justify the homicide. It appears from the record that, in response to such request, the Judge charged the jury, that such circumstances were not sufficient to excite the fears of a reasonable man. Under the Code, section 4265, it is laid down: "A bare fear of any of those offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man." The testimony shows that after the prisoner called the deceased a "damned liar," he rose, put his hand in his pocket and advanced toward the defendant. Under these facts, was the Court authorized, in charging the jury, that such circumstances were not sufficient to excite the fears of a reasonable man? This Court, at the present term, in the case of *Stephen D. Mitchell vs. The State*, in an indictment for an assault with intent to murder, held, that "the putting the hand in the pocket by the party when assailed, did not justify the assailant in beating him; that it required some act or appearance of drawing a weapon. Men must depend on something more than this, without the assistance of threats. There must be some apparent preparation to draw a weapon; something showing the party has, in fact, a weapon; something more than imagination or bare fear to justify or palliate acts of violence to the person." Under this ruling, upon examination of the testimony, the fear excited by putting the hand in the pocket was only a bare fear that he might draw a weapon, or that he had a weapon; but was not sufficient, in itself, to justify the taking of human life. This act of deceased, the prisoner having his pistol drawn at the time, was not such an act as justified the homicide. The charge of the Court in this case was the converse of the proposition requested, and, under the rule laid down in 27 *Georgia*, the

converse of a proposition, provided the proof preponderates that way, was held by this Court not to be error. Such view excludes, however, in cases of murder, the question of intent or malice from the jury, and we think the Court erred in its further charging the jury, that the facts made the act murder.

3. The third ground of error is, that the Judge charged that malice is implied in all cases where the slayer takes life for words, threats or menaces, without other provocation. Such we hold to be within the meaning of section 4259 of the Code; 25 Georgia, 210; 39 Georgia, 31; 24 Georgia, 298. Malice is implied from any deliberate act, however sudden: 3 Kelly, 326. Deliberate killing, with great provocation, is murder; that words, threats and menaces are insufficient, is held in 28 Georgia, 203, 219; 29 Georgia, 607. Code, section 4256, says: "Malice shall be implied where no considerable provocation appears." And section 4259, in defining voluntary manslaughter, declares: "Provocation by words, threats, menaces, or contemptuous gestures shall, in no case, be sufficient to free the person killing from the guilt and the crime of murder." The law demands some actual assault, or an attempt to commit a serious personal injury, or other equivalent circumstances; and such equivalent circumstances must, in effect, be equal to an assault, or an attempt to commit a serious personal injury. For the same section declares provocation by words, threats, menaces, or contemptuous gestures not to be equivalent; for these, in no case, shall be sufficient to reduce the killing from the guilt and crime of murder. In the case of *Mitchell* decided at this term, this Court held, that newspaper articles, though slanderous, and scattered through every household, were insufficient to justify an assault and battery; and, upon like reasoning, abusive words would not justify a homicide, but, under the facts in this case, the abusive language came from the prisoner, and, from the proof, no answer was made by the deceased. We have already held that his acts did not

justify the homicide, and the Code, section 4259, says the provocation was insufficient. In 24 Georgia, 305, this Court held that the terms of the law, to commit a serious personal injury on the person killing, means a bodily injury, and not a personal affront or personal wrong. But if we take the words of deceased, that the prisoner was the person who "stole the lamp," and regard this accusation as the primary affront, there is still nothing in that to reduce the crime; and the reply of the prisoner, coupled with his having a pistol drawn, exhibited, in the opinion of the Court, such deliberation as authorize the verdict in this case.

4. And, being satisfied with the verdict upon the facts, we affirm the judgment.

Judgment affirmed.

JESSE ROBINSON *et al.*, plaintiffs in error, *vs.* COVINGTON DUMAS, administrator, defendant in error.

The judgment of this Court at the December Term, 1869, in the cause then pending between the parties in this very matter, was a final judgment upon the points made in the affidavit of illegality, and now again brought before this Court, and the Court below did not err in dismissing the illegality.

Res Adjudicata. Before Judge CLARKE. Calhoun Superior Court. September Term, 1870.

This cause was here at December Term, 1869. See Dumas, administrator, *vs.* Robinson, *et al.*, 40 Georgia Reports, 349. The judgment below was then reversed, upon the ground that the Court below erred in passing on but a part of the issue submitted to him, and because it did not appear that the consideration of the debt upon which the judgment was founded was slaves, or the hire of slaves, and that the

Court ought to have ordered the *fi. fa.* to proceed for one-third of the amount due on the judgment.

When the *remititur* was returned to the Court below, he ordered it entered upon the minutes, that the *fi. fa.* be credited with two-thirds of the amount due thereon, and proceed for the other third. When the illegality case was called, Dumas' counsel moved to dismiss it, because by the judgment of the Supreme Court, already made the judgment of the Court below, the matter was *res adjudicata.* On that ground the Court dismissed the illegality. That is assigned as error.

B. S. WORRILL, E. L. DOUGLASS, C. B. WORRILL, by R. H. CLARK, for plaintiffs in error.

VASON & DAVIS, R. H. LYON, HOOD & KIDDOO, for defendant in error.

McCAY, J.

The judgment of this Court on the issue tendered by the defendant in this affidavit of illegality was as follows: The tribunal to which the question had been referred had decided that the evidence before him showed a part of the consideration of the debt to be slaves, but he further decided that, as the evidence did not show what part of it was slaves, he would refer it to a jury.

This Court, upon this point, at December Term, 1869, reversed the judgment of the Court below on two grounds:

1st. This Court held that the evidence did *not* show the consideration to be slaves, and that the Court ought to have ordered the judgment to proceed for the one-third not paid.

In our judgment that settled the dispute. It would be very unfair to keep open this part of the dispute and close up the claim of the plaintiff for the two-thirds he said was not paid. If there is to be a rehearing upon *one* point, it would be only fair to open the other. But the Judge only

obeyed the order of this Court in directing the execution to proceed for the one-third, as it was the clear judgment of this Court that he should so do. We therefore affirm his judgment in dismissing this illegality.

Judgment affirmed.

W. A. HATCHER, plaintiff in error, *vs.* MILLY CUTTS, defendant in error.

Where two minor children were bound as apprentices by the Ordinary of Calhoun county, and the order stated that it was made upon the written consent of the parent, and on a *habeas corpus* by the parent, there was evidence strongly indicating that the parent had been imposed upon and did not understand the purport of the writing, and the Judge awarded the children to the parent:

Held, That this was no abuse of the discretion of the Court.

Habeas Corpus. Minors. Fraudulent Judgments. Before Judge CLARKE. Calhoun Superior Court. September Term, 1870.

Milly Cutts, a negro, signed the following paper:

"GEORGIA—CALHOUN COUNTY:

"I, Milly Cutts, do hereby agree that my children may be bound out to W. A. Hatcher and W. T. Wilkerson.

"MILLY her ⋈ mark. CUTTS."

Test:

"A. D. his ⋈ mark. HOWARD."

Thereupon, Hatcher applied to the Ordinary of said county, in July, 1870, represented that her children, Mary, nine years old, and Aaron, three years old, had no parents in the county; (their mother being in jail, for stealing, in Sumter county;) that they had no means, and were likely to become chargeable to the county, and prayed that they be bound over to him,

as apprentices, till they were twenty-one years old, respectively. Upon the production of said consent, and proof of the facts stated in the petition, the Ordinary bound them to Hatcher, pursuant to the prayer.

In September, 1870, Milly Cutts sued out *habeas corpus* against Hatcher to regain possession of said children. He answered, setting up said consent and judgment as his justification for holding them. This consent Milly's counsel traversed.

When the cause came on for hearing, Hatcher moved to dismiss the warrant, because, by his answer, it appeared that he had custody of the children under the order of a Court having jurisdiction, etc. This motion was overruled.

Milly then testified, that in July, 1870, she was working for Hatcher at fifty cents per day, and had her five children with her; that Cutts came with a warrant from Sumter county, charging her with having stolen $600 00 from him, and was about to carry her to Sumter for trial. Before going, she agreed that Hatcher should have the care of these children till she returned, and she did not understand that she was agreeing to more than this when she signed said paper. She admitted that she left them without any food or means of support. She further said that a Mr. Ansley had taken her from jail, by standing her security, and that she had agreed to live with Cutts, her former master, and work out the stolen money, and that she wished to carry her children with her.

Cutts testified, that he had agreed to take Milly and her children and keep them while she worked out said $600, and that he would do so; that she was a good hand on a farm.

Hatcher testified, that when Milly was about to be taken away, as aforesaid, she asked him to take care of her children, and he said he would, if the Ordinary would bind them to him; that he went to the Ordinary, who said he would bind them to him if their mother consented, and wrote out said paper for her to sign; that he took the paper to her

and read it over to her, and she signed it, saying she understood it. The Court asked Hatcher what he said to her in explanation of said paper, and he said he told her it was an agreement that he should take care of her children. (It appeared that Wilkerson had the other three children.)

Howard testified, that he understood the paper, and that Milly said she did; that she said she wished Hatcher to have these children; that something was said about her returning, but he did not remember what.

The Court ordered the children to be returned to her. This, and his refusal to dismiss the writ on the said motion, are assigned as error.

VASON & DAVIS, by R. H. CLARK, for plaintiff in error.

LYON, DEGRAFFENREID & IRVIN, by Z. D. HARRISON, for defendants.

McCAY, J.

The testimony of Milly Cutts, with the admission of the defendant, in his reply to the inquiry of the Judge, pretty strongly shows that the order of the Ordinary was improperly procured. The evidence all shows that the Ordinary would not have passed the order without the consent of the mother, and the defendant admitted to the Judge what the mother testified to, on oath: that she was not informed of the contents of the paper; that, on the contrary, she was misled as to its meaning. If this be so, the order might be collaterally attacked, since it was fraudulently procured.

We are free to say that we do not think the mother in a very good condition to take care of these children, and we fear that their condition will not be bettered by delivering them to her. Still, the law leaves this with the Judge, and it is not our province to interfere with his judgment, on the facts, unless the case against his judgment be a strong one.

It must be a case of abuse of discretion to make his judgment illegal. It is only over errors of law that this Court has jurisdiction: *Starr vs. Barton*, 34 *Georgia Reports*, 99.

Judgment affirmed.

GREEN B. FAIRCLOTH *et al.*, plaintiffs in error, *vs.* N. P. BRINSON, administrator, defendant in error.

Where A. made her will, in 1860, in which she gave $1,000 00 to S., as trustee for her grand-children, and appointed S. also executor of her will, and during the life of S. it was claimed in defense of this action, brought to recover the legacy from B., the administrator, *de bonis non*, etc., that he, S., had paid this amount, and upon the trial, in support of such defense, it appeared, by the proof of a Confederate States depository, that S. had invested certain funds in four per cent. certificates of such Confederate States, the trustee not stating for whom; and also a loose paper memorandum, containing an entry, in his handwriting, of such fact being for the complainants, and there was proof of the bonds not being found, etc., and counter-testimony of an order granted by the Judge of the Superior Court authorizing such investment for the estate, and other *cestui que trusts* by name, but not these complainants, and his returns, and the jury, upon the facts, found for the defendants, and a motion for a new trial was overruled by the Court:

Held, That, under the facts in this case, the Court erred in overruling the motion for a new trial, upon the ground that the evidence was not sufficient to show that the money had ever been separated from the estate and paid to himself, as the trustee for the Faircloth children.

Administrators and Executors. Before Judge CLARKE. Dougherty Superior Court. June Term, 1870.

(The opinion gives all the facts necessary for understanding it.)

STROZIER & SMITH, for plaintiffs in error.

WRIGHT & WARREN, for defendant.

LOCHRANE, C. J.

This case arises out of a bill of interpleader, filed by Brinson, as executor of Sarah Foreland. The will of Sarah Foreland gave to J. L. B. Scarborough, in trust for Reddin Faircloth and others, her grand-sons, $1,000 00, which he was authorized to loan out and apply the yearly proceeds for the benefit of the *cestui que trusts*, to be turned over to them as they became of age; and, in case there was not sufficient arising from the sale of property directed to be sold by the will, the deficiency was to be made up out of the share of Scarborough. By the ninth item of said will, Scarborough was appointed one of the executors. This will was executed in July, 1860, and after the death of the testatrix, Scarborough qualified as the sole executor, and took into his possession the whole estate. After his death, Brinson qualified and undertook the execution of so much of the will as was left unexecuted. This suit originated in the Court of Ordinary, by rule, requiring him to show cause why he should not pay over the $1,000 00 and interest claimed by the legatees, under the will of the testatrix. Upon the hearing, the Ordinary ordered the money to be paid, upon the legatees executing a refunding bond. This decision was appealed from to the Superior Court. This bill alleges that the Ordinary had no right to issue such judgments and presents other claimants not represented before the Ordinary, and makes all parties at interest parties to the bill, etc.

Upon trial, it appeared, upon the part of the plaintiff in error, that under the 7th section of the will of Sarah Foreland, they were entitled to $1,000 00 specific legacy. The defendant, in discharge of this liability, set up that Scarborough, as executor under the will, had sold property belonging to the estate, and had, as trustee of said plaintiffs in error, received from himself, as executor, the said $1,000 00 in Confederate money, and had invested it in four per cent. bonds of the Confederate States, and, in evidence, showed by a Con-

federate depository, that he had made investments, and had received certain bonds corresponding in amount, but not expressing, in terms, the parties for whom such instrument had been made. It also appeared, upon examination of his papers, after his death, and in the offices of other custodians of such papers, that these certificates could not be found, and that upon a loose piece of paper, in the handwriting of the decedent, there was this entry: "John L. B. Scarborough, trustee for the heirs of Elizabeth Faircloth, children, one bond, Confederate, $1,000 00." Also, a tax receipt, received from him, as trustee of the heirs of Faircloth, $4 60, for State and county tax, for 1864; also, a memorandum from the tax book for 1864, charging himself, as trustee of Elizabeth Faircloth's children, amounts of money, etc., $1,000 00.

The complainants then put in evidence the petition of Scarborough to Judge Clarke, showing the application asking authority to invest moneys belonging to the estate, and for his two wards, Sarah and Reddin Clifton, which order was passed on the 22d March, 1864, and also his return, in 1864, in which there were no returns of amount charged to himself, as trustee of the Faircloth children. The case was submitted to the jury, who found there was nothing due respondents, and a motion was made for a new trial, upon several grounds, alleging error in the admission of testimony and the finding of the jury, to which we will briefly address ourselves.

We remark that the principles of law controlling this case may be found in the case of *Brown vs. Wright and wife*, 39 *Georgia*, 99. We do not question the right of those who were invested with a fiduciary character, during the late war, to discharge themselves from liability by the exhibition of good faith and the exercise of such prudence and care in the management of trust-estates, as the rules of equity and law require. Any higher degree of liability would be manifestly unjust to such trustees, and any less would be violative of the rights of women and children, whose estates they repre-

sented. This case presents, if any could, an exceptional feature to the requirements of the general rule, in that the bequest of $1,000 00 was, if deficient from other sources, to be made up from the legacy of the party clothed with the powers of this trust. Was it legitimate for him, as executor of this estate, charged with the payment of this specific sum of money, under a testament made with a view to the payment of a gold currency, to discharge himself, in 1864, by an investment in Confederate certificates at a depreciation of some $20 00 to one? The rule that requires good faith in the fiduciary agents can hardly be recognized as embracing a principle of such palpable and manifest injustice. Scarborough was the executor of the will as well as trustee. The confidence reposed in him by the testatrix, as well as the duty imposed by law, demanded the utmost good faith, and we do not think, under the facts in this case, that it was within the spirit or letter of his duty to charge himself with this trust and discharge it almost simultaneously by an investment, to say the least, doubtful in its solvency and depreciated in its value to an extent which diminished the legacy to a mere nominal amount. Such investment was not a payment to the *cestui que trusts*, and cannot operate as an estoppel to the collection of their claim against the estate. It was the will of their grand-mother that these minors should receive from her estate the amount of $1,000 00. We do not think that it has been paid over to them, by operation of law, through this alleged investment in Confederate certificates.

Judgment reversed.

MARY MILLS, administratrix, plaintiff in error, *vs.* WARREN A. MAY, administrator, defendant in error.

1. The execution of a deed to which an affidavit has been filed, under section 2670 of the Revised Code, cannot be proven by acknowledgements of the supposed maker of the deed that the land described was the property of the supposed grantee.
2. When on the trial of an action of ejectment the evidence turned on the question of title, and the verdict was for the defendant, and the plaintiff moved for a new trial on the ground of newly discovered testimony by which it could be shown that the defendant, whilst in possession of the land, had admitted that the same was the property of the plaintiff, he being the tenant, or in possession, as the agent of the plaintiff:

Held, That this did not come within the rule of excluding commulative testimony, as it went to a new and distinct right to recover, and a new trial ought to have been granted.

Ejectment. New Trial. Before Judge CLARK. Calhoun Superior Court. September Term, 1870.

This was ejectment by Doe, on the demise of Mary Mills, as administratrix of Frederick Mills, against Roe, casual ejector, and said May, as administrator of William Mills, tenant in possession, for land lot number one hundred and eighty-three, in said county.

Plaintiff claimed under a conveyance of said land by William Mims to Frederick Mills, made in March, 1857. The sole heir of William Mills and said May, had filed an affidavit that said deed was a forgery. When the cause was called for trial counsel agreed that the whole case, both the affidavit and the issue of title, should be tried simultaneously. Plaintiff's counsel testified that he had had said original deed, but it was lost or destroyed; said he did not know whether it was genuine. They then read in evidence a copy of said deed taken from the records. It was recorded in 1869.

Plaintiff's counsel then read in evidence two papers, as follows—after proving that they were signed by William Mills:

"Received of Frederick Mills, to the hire of two negroes—Rials and Isaac—hired to Cheever, for $425 00, and this year $400, Golly.....$ 825 00
Also the rent of his land for..... 400 00
Also Tom, I sold to Brown..... 851 00
Also his cotton, 210, payable new years, 60..... 260 00
I sold his mules to Roberts for cash..... 168 00
He let me have $150 note on McNeave..... 300 00
A receipt on W. Smith for collection or returns..... 426 00
Which I promise to collect or return 2d Nov., 1858.

WM. MILLS."

"DECEMBER 22, 1858.

DEAR SIR: Mr. Patillo wants to hire Rial, Isaac; Duke wants to rent your land for next. Refused on the ground, I want you to go on, your land is good, and you can do as well there as anywhere. I have made agreement with Dawson to go West, that I cannot attend to your business any more. I shall start to Stewart next January. * * * *

I shall come to see you next week and bring money, for I know you are in need of it. Have all my papers where you can lay your hand on them, and I will have yours, as I intend to leave all your papers.

"WM. MILLS.

"To F. MILLS."

The defendant introduced no evidence.

The Court charged the jury that, if the papers in evidence showed that William Mills owed Frederick Mills for rent of land, without specifying this lot of land, or advised Frederick to enter upon his lands, without specifying this lot of land, they were insufficient without other evidence to set up the deed; that plaintiff must know this is the lot of land referred to, or that Frederick Mills had no other land. The jury found for the defendant.

Plaintiff's counsel moved for a new trial upon the grounds that the Court erred in charging as aforesaid, and because the verdict was contrary to the evidence, etc; and for certain

newly discovered evidence. This newly discovered evidence was, that one Griffin would swear that a few weeks before William Mills died, Griffin applied to him to rent lot number one hundred and eighty-three, when William Mills told him it was Frederick Mills' land, that he had written Frederick that he was going West, and could not attend to his business longer, and said Griffin must rent it from Frederick Mills, who then lived in Mitchell county, and that he was trying to get Frederick Mills to move on to the land. This was shown by the affidavit usual in such cases. The Court refused a new trial, and that is assigned as error.

STROZIER & SMITH, for plaintiff in error. Judge cannot intimate opinion as to what is proven: Revised Code, section 3183; 39 Ga. R., 597; 40th, 291. Newly discovered evidence: 34 Ga. R., 1565; Revised Code, section 3665.

L. P. D. WARREN, by R. H. CLARK, for defendant.

McCAY, J.

We see no error in the charge of the Judge, upon the evidence. It was nothing but his duty to point out to the jury the necessity, resting upon the plaintiff, to show that the papers introduced and the admissions referred to the particular land described in the declaration, and this is all the charge amounts to. Whether the evidence did this or not, was distinctly left to the jury. We think, too, the jury was right in their finding. There was, in fact, no evidence to justify a verdict for the plaintiff. Everything in the papers produced, and in the admissions of the deceased, might have been true, and the plaintiff's deed be a forgery, nevertheless; since there was nothing to show that the reference was to the land in dispute. The evidence would apply just as well to any other tract of land in the county as to this. Besides, every word might have been true, and have applied to the land sued for, and yet the deed remain untrue. So far as

the execution of the deed is concerned, there was absolutely *no evidence.* We do think, however, the newly discovered evidence was important. Not that it proves the deed, but that it shows the defendant to have been the tenant or agent of the plaintiff. Had *this evidence* been before the jury, they must have found for the plaintiff.

Nor is it, in any fair sense, purely cumulative. The issue before the jury was as to the execution of the deed. This evidence bears upon the question of whose possession the defendant's possession was. If the new evidence is true, the defendant was holding the land for the plaintiff, either as his tenant or his agent. In either event, it was the plaintiff's possession, and he was entitled, *prima facie,* to recover on it, whether he proved title or not.

We think, therefore, the Court ought to have granted the new trial for this reason.

Judgment reversed.

WILLIAM A. BYRD, administrator, plaintiff in error, *vs.* SARAH E. LEWIS, administratrix, defendant in error.

When A, as administratrix, filed her bill against B, administrator, to enjoin suits in ejectment and for the purchase of land, upon the following statement of facts: A and B, in their lifetime, bought together a certain ferry and lands, A taking title to himself, and afterwards made title to one-half to B, and B made payments, and gave his note for balance of the purchase-money, and B also turned over to A the whole proceeds of the ferry, aud other accounts alleged to have been paid, and which, together, amounted to the balance due, and the Court overruled the demurrer to the bill and granted the injunction prayed:

Held, That the judgment of the Court was not error, in this, that jurisdiction for purposes of injunction existed in the county when the suits were pending, and the facts alleged made a proper case for equity interference.

Equity Jurisdiction. Injunction. Before Judge STROZIER. Mitchell County. Chambers. March, 1871.

Byrd *vs.* Lewis.

William A. Byrd, as administrator of Benton Byrd, filed his bill, in Mitchell county, against Sarah E. Lewis, administratrix of Thomas Lewis, containing the following averments: In 1858, land lots, numbers forty-seven, forty-eight, sixty-three, and seventy-six, in the Ninth District of Dooly county, including the Danville ferry and its franchises, were about to be sold. Benton Byrd and Thomas Lewis agreed to buy them, jointly. Lewis bid them off at $2,000 00, took title in his own name, and paid for them. In 1861, they had a settlement of said contract, and Lewis made Byrd a deed to a half interest in number sixty-three, and the ferry and franchises, and took Byrd's note for $793 94, the balance due Lewis, under the contract. As soon as Lewis made said purchase, he and Byrd took joint possession of the property, as theirs in common, and so continued till they both died, in 1869. Being intimate friends and having great confidence in each other, no other consummation of said contract was made.

Some time after giving said note, Byrd paid Lewis $500 00 on it, and, by Byrd's request, the ferryman paid Lewis all the ferriage, to-wit: $487 70, to discharge said note. One-half of this $487 70 belonged to each of them. And, since the death of the parties, Sarah E. Lewis, as Thomas Lewis' administratrix, has received $600 00, being all the ferriage. Byrd, for many years, did all the repairing, etc., of the ferry, at a cost of $500 00. Besides this, Byrd owed Lewis $130 00 for a mule. This shows the state of the accounts between them.

Yet Lewis' administrator, residing in Sumter county, has sued Byrd's administrator on said note, for its full amount, and for said mule, and brought ejectment against him for said number seventy-six, although Byrd had had joint possession of said lot under said contract ever since the purchase. He prayed for an account and settlement, and for injunction against said suits. The bill was demurred to because there was no jurisdiction over the subject matter in

Mitchell county; because it contained no equity, and because the remedy at law was complete. At the hearing, complainant's counsel presented affidavits of witnesses to admissions by Lewis, of the facts stated in the bill. The demurrer was overruled and the injunction was granted. That is assigned as error.

HAWKINS & GUERRY, HINES & HOBBS, for plaintiff in error.

VASON & DAVIS, by R. H. CLARK, for defendant.

LOCHRANE, C. J.

This was a bill filed by Byrd, as administrator, alleging that his intestate, and the intestate of the plaintiff in error, both being in life, bought together certain property in Dooly county, including the Danvil Ferry and its franchises; but Lewis took the title to the same in his own name, and made a deed to Byrd for one-half of the said ferry and franchise, and lot of land number sixty-three, taking the note of Byrd, for $793 94, the balance due. The bill alleges two payments by Benton Byrd, the intestate, amounting to some $500 00, and that he turned over the whole of the money collected for ferriage to the discharge of the balance of said debt, which he avers amounted to some $487 70, up to July, 1869, one-half of which belonged to Benton Byrd, and that the estate of Lewis has collected from the profits of said ferry some $600 00, one-half of which belonged to said Byrd. The bill also alleges the expenditure of some $500 00, of which one-half belonged to said intestate. It also alleges the death of the contracting parties, their great intimacy and confidence with each other, and their decease without any final settlement between them; avers full payment of the outstanding liability, the institution of suits in Mitchell county for balance on account alleged to be due, and action of ejectment, and prays an account and injunction restraining said suits,

with the usual prayers for process, relief, etc. Original affidavits are attached to this bill, supporting the allegations contained therein, and also a motion to dismiss the same for want of equity. The Court overruled the demurrer and motion, and granted the injunction prayed for, which judgment by the Court forms the basis of the writ of error upon which the case comes before this Court for review.

Upon examination of the bill, we think the Superior Court had jurisdiction to grant the injunction and enjoin the actions at law until a hearing could be had upon the bill; and we think there was ample equity in the bill as presented to the Court. The facts alleged being all admitted to be true by the demurrer, the purchase-money for which this suit was instituted, and out of which the action of ejectment grew was fully paid off and discharged, and it would be inequitable to permit the parties to proceed with these actions, if the facts alleged are true.

Judgment affirmed.

THE STATE, *ex relatione*, PETER COLLINS, plaintiff in error, *vs.* E. BYRD, sheriff, defendant in error.

Where a sheriff, by mistake, sold property on the first Tuesday in May, but discovered the mistake before the money was paid by the holder:

Held, That he could not be compelled by *mandamus* to make a deed and deliver possession to the bidder, on his tender of the amount of his bid.

Sheriff's Sales. Mistake. *Mandamus*. Before Judge GIBSON. Burke Superior Court. May Term, 1870.

On the first Tuesday of May, 1870, Byrd, as sheriff, at the usual hour and place of sheriff's sales, offered for sale a lot under a mortgage *fi. fa.*, and it was bid off by Collins. He tendered the sheriff his bid, but the sheriff refused to

make him a deed. Collins sued out *mandamus* to compel him to do so. By counsel it was demurred to, upon the ground that *mandamus* was not a proper remedy. The Court sustained the demurrer, and that is assigned as error. (This is all the *record* shows. But the *bill of exceptions* states that Byrd's refusal to make the deed was because the land was not advertised to be sold in April, but in May, 1870. And the Judge certifies that that fact was made to appear to him on the hearing.)

STEPHEN D. COKER and JOHN D. ASHTON, for plaintiff in error.

JOHN J. JONES, for defendant.

McCAY, J.

We are rather inclined to the opinion that the Judge of the Superior Court, under that general power which he has over its officers, may compel the sheriff, by rule, to execute a deed in performance of his duty as sheriff, in executing the processes of the Court, as well as to put purchasers in possession of property purchased at a sale, under a *fi. fa.*, and that a *mandamus* is not necessary, there being another remedy: Revised Code, section 3142. But we do not put our judgment, in this case, on that ground. As appears by the facts set forth in the bill of exceptions, this land had not been advertised for sale on the first Tuesday in April at all. The day fixed in the notice was the first Tuesday in May. That *this* notice had run four weeks, by the first Tuesday in April, does not help the matter. There was *no* advertisement at all for *April*, and had an actual sale been completed, the defendant's title would have been *illegally* sold. It may be true that a purchaser, without notice of the illegality, would have gotten a good title, under section 2586 of the Revised Code. But to make one an *innocent purchaser* in such a case, there must be more than a mere bid. He must

have paid the money. He must have put himself in a new situation, so that he would be damaged by the transaction, if it were set aside. The law does not make such a sale a legal one; it only declares that an innocent purchaser shall be protected, leaving the defendant in the *fi. fa.* to his remedy against the sheriff.

It is a general rule that, to make an *innocent purchaser*, requires that the purchaser shall not only have bargained without notice, but he must have paid his money, or done some other act which makes it unjust to set up the rights of the equitable owner. Here the mistake was discovered before any harm was done, and the sheriff did right to refuse to complete the sale; the purchaser paid nothing, received no wrong, and it would be unjust and unfair to permit him to have the land, to the injury of the defendant. As it was never advertised for sale on the day it was sold, the plaintiff, the defendant, and all who would probably have been called, by the notice, to be present, were entrapped.

We think, therefore, that the sheriff was right, and we affirm the judgment of the Court, on the ground that the relator had no right to demand the deed.

Judgment affirmed.

WILLIAM J. VASON, plaintiff in error, *vs.* THE SOUTH CAROLINA RAILROAD COMPANY *et al.*, defendants in error.

1. The use of steam engines to draw trains of cars over the street railroad, laid down by the Augusta and Summerville Railroad Company, through Washington street, in the City of Augusta, is expressly authorized by Acts of the Legislature of this State, and by the contracts and ordinances of the City of Augusta, and being so authorized, the running of said trains cannot be abated as a public nuisance, under the Revised Code of this State, even though such use "tend to the immediate annoyance of the citizens in general.
2. Whether the Court of Equity will now restrain the unreasonable exer-

cise of said privilege, so as to interfere with the ordinary use of the street by the citizens, as not within the scope of the privilege granted by the Legislature, and whether property holders upon the street, who are damaged by the use of the same, even within the scope of the legislative grant, may recover are questions which cannot be made in a proceeding to *abate* the use complained of as a *nuisance*, and upon these questions this Court expresses no opinion.

Railroads. Municipal Corporations. Nuisance. Before Judge GIBSON. Richmond Superior Court. June Term, 1870.

Vason made an affidavit that locomotive engines, drawing long trains of cars, then were and for a year before, had run on the railway located in Washington street, between Reynolds and Telfair streets, in the City of Augusta; that this was a nuisance "which tends to the immediate annoyance of" and works hurt, inconvenience and damage to "the citizens in general," whose business requires them to pass along or across said street, and who reside in or own houses near to and fronting on said street: 1st. By impeding and obstructing the free and common use of passage along and across said street, by the length and irregular movement of trains of cars. 2d. By shaking the houses, thereby breaking the plastering and filling the houses with dust and smoke. 3d. By disturbing the occupants by the noise of bells and steam, frightening animals drawing vehicles, etc. Said street is but sixty-five feet wide, and is one of the most ancient and populous streets in Augusta, and this running of locomotives, etc., endangers the lives of citizens, and has killed some, and decreases the value of all the property on the street. These trains and locomotives belong to the South Carolina Railroad Company, the Charlotte, Columbia and Augusta Railroad Company, and the Georgia Railroad and Banking Company. And he prayed the Mayor and Council to abate the same, as a public nuisance. Many minor questions arose on the trial, which throw no light upon the opinion.

Vason proved the averments in his affidavit by "a cloud

of witnesses." The defense was, that by Acts of the General Assembly, the Mayor and Council of Augusta had a right to allow said street to be so used, and that it had contracted with said railroad companies, so as to permit such use. The acts, ordinances of the city, and contracts alluded to, were put in evidence.

Vason contended that the Charter of Augusta (1798,) gave the City Council no power to grant the right to lay said track in a street, that the Acts relied upon was unconstitutional, because they made no provision for compensation to those injured by such use; that they did not contemplate the using of *steam* upon the railroad, and if it were contemplated the manner of its use and its results made it a nuisance.

These two bars of iron constituting the railroad track, were in the middle of the street, without embankments or excavations, and passage across the street, etc., is only interrupted by the presence of the trains.

The City Council decided that this was not such a nuisance that they should require its abatement, and dismissed the petition at Vason's costs.

He carried the matter to the Superior Court, upon all the questions made below. The judgment below was affirmed, and that is assigned here as error.

W. J. VASON. JAMES S. HOOK, plaintiff in error. This nuisance is abateable by the Mayor and Council of Augusta: 40 Ga. R., 87; R. Code sec. 4478. It was a public nuisance: R. Code, sec. 2949; 9 Ga. R., 425. Corporations take no power except by express grant: 4 Wheat. R., 626. Act of 1856 did not authorize these contracts. Power to decrease value of easements: 1 Redf. on Railways, 303. The fee of streets is in adjacent land owners: 1 Redf. on Railways, 300, *et seq.*, 314; 2 Bouv. L. Dic., 551; 4 Serg. and R., 108; 4 Bacon's Abr., 408; 1 Bouv. L. D., 586; 1 N. H. R., 16; 1 Conn. R., 103; 1 Pick. R., 122; 1 McCord, R., 67; 2 Mass. R., 127; 3 Rawl's R., 495; 15 John's R., 483; 9 Serg. &

R., 33; Adams on Eject., 19–18. A right by law may be so used as to become a nuisance: Cooly's Con. Lim., 544, 547.

W. T. GOULD, F. H. MILLER, A. R. WRIGHT, W. HOPE HULL, for defendants. This is a public nuisance, if any, and is abateable by indictment only: 28 Ga. R., 418; 15th 61, 62; 40th 87; R. Code sec. 2946 4478; 2 Gray, 54, 339. Owners of land on street whereof the fee is in the State have no right to institute such actions as this: 8 Dana, 289, 301, 307; 1 Allen, 190; 32 Conn. 579; 33 Miss. R., 128; 3 Bar., 459; 10th 26; 27 N. Y. R., 188. The City Council may grant such use if it do not unreasonably abridge public use of the street: 7 Barb., 508; R. M. Ch. R., 342. If authorized by law, no nuisance: 14 Conn. R., 565; 17th, 372; 8 Gill & J., 479; 4 Cush. R., 63; Railroads have right to use steam if contracts permit them to connect railroads; 12 Ind. R., 552; 37 Bar., 357; Act 21st March, 1864, sec. 9; Act Feb. 20th, 1869; 13th Bar., 646; 8 Dana, 289; 33 Ga. R., 601; Act of 56th Oct., 1870.

McCAY, J.

1. That the use of steam engines to draw trains of cars through Washington street, in the city of Augusta, thus connecting the various railroads entering the city at different points, is authorized by the contracts and ordinances of the city is not disputed. Indeed, it is too plain for dispute. The only question there can be on this point is the authority of the city to do this. It seems to us that this too is very plain. The Act of February 15th, 1856, authorizes the City Council to permit the connection of all railroads in the city, by common tracks, depots, or otherwise, on *such terms and conditions* as may be fixed by the City Council. The Act incorporating the Columbia and Augusta Railroad Company, authorizes it to construct a road to be used with steam, animal or other power, crossing the Savannah river and connecting with the Georgia Railroad: *Provided*, the consent

of the city authorities of Augusta be first obtained. And the Act of October 26th, 1870, in express terms, ratifies and confirms these several contracts and ordinances, by which the City Council has at various times and by various contracts and ordinances, permitted and *sold* this right to use the street railroad in the manner complained of.

But even without this, assuming the *chartered* rights of these roads to *connect through the city*, much might be said in favor of the right of the *City Council*, under its *general power* over the streets and over nuisances in the city, etc., to allow the connection in this special manner, at least so far as to purge the act, when done, of any quality of a public nuisance, subject to abatement.

2. Without doubt, the use of steam locomotives, puffing, blowing, whistling, clattering and crushing through the streets of a city, or along a public highway in the country, comes within the definition of a public nuisance. It is an annoyance to the citizens in general. It is dangerous to human life, and requires constant care and watchfulness from all who are in the vicinity of it to keep free from damage from it. But there are two kinds of nuisances: public and private. "A public nuisance damages all persons who come within the sphere of its operations, though it may vary in its effects upon individuals. A private nuisance is one limited in its effects to one or a few individuals." Revised Code, 2946. For the latter, the persons injured have a right of action for damages. For the former, no such right exists, unless there be special damages to one in which the public do not participate. Revised Code, section 2947. The reason for this distinction is an obvious one. The public is the redresser of its own wrongs. What the public suffers from, the public may punish, or not punish, at its discretion. There may come more good than evil from it, and the public may see fit to permit it. But a private nuisance stands on a different footing. Each individual injured has his right of redress for the damages he has received. And even as to pub-

lic nuisances which give special damages to individuals, in which the public do not participate, it is not fair for the public to put its burdens upon a few without compensation. Hence, for the special damage, the person injured has his redress. Revised Code, section 2947.

The proceeding now before the Court is not an action for the damages which any one has received from a nuisance. It is an effort to abate the use made of this railroad as a nuisance to the public. Were this an action for damages, we might discuss the meaning of that clause of section 2949 of the Revised Code, which declares that "the fact that the act done is otherwise lawful does not keep it from being a nuisance." But very clearly the reference there is to private nuisances, or to such public nuisances as individuals may receive special damage from, in which the public do not participate. Very much might be said in favor of the doctrine, that even the Legislature cannot, by a law, authorize an act so as to deprive the citizen of an action for the *special damage* he receives from it, unless he be otherwise compensated. But in the case before us, Mr. Vason appears in behalf of the public. Under the facts in the record, if this is a nuisance at all, it is a public nuisance. He has so attacked it. Whatever damages it causes are "damages to all persons who come within the sphere of its operations, though it may vary in its effects on individuals." Revised Code, section 2946.

By section 4478 of the Revised Code, "any person who shall erect, or continue, after notice to abate, any nuisance which tends to annoy the community, or injure the health of the citizens in general, or to corrupt the public morals, is indictable, and may be punished by fine and imprisonment." Now the nuisances subject to abatement as public nuisances, are described in almost the same language: "Any nuisance which tends to the *immediate* annoyance of the citizens in general, is *manifestly* injurious to the public health and safety, or tends *greatly* to corrupt the morals and manners of the people may be abated," etc. Such a nuisance as may be

abated as a public nuisance, it is an indictable offense to erect, or to continue after notice.

A crime is the violation of a public law: Revised Code, section 4227. Can that be a violation of a public law which a public law has specially authorized? Will the *public* abate, as a public nuisance, an erection which the public, by a statute, has expressly permitted to be erected? Whatever wrong there is in an act, which makes it a public nuisance, is a wrong to the public, and it is absurd to say that a thing is a public wrong which the public has, by special law, permitted to be done. And such is the uniform current of authorities, both in England and America: Rex vs. Pease, 4 Barn. & Adol., 19; 9 Barb., 350; 18 Barb., 222; 15 Barb., 193; 10 Barb., 26; 13 Barb., 646; 6 Barb., 313; Roscoe's Crim. Ev., 659; Bacon's Ab. Tit. Nuis, A.; 8 Gray, 197; 11 Richardson, 114. See, also, Hilliard on Torts, 1 volume, 550, 551; Sherman & Redfield on Negligence, 416. The only reply that can be made to this list of authorities is, that these cases refer to an *indictment* for a nuisance, and this is, in the main, true. But our proceeding to abate is only another mode of doing what it was one of the principal objects of an indictment, at common law, to do, to-wit: to abate the nuisance. It was a part of the judgment of the Court, on conviction of the offender, if the nuisance was continuous, to direct the sheriff to abate the nuisance: Wharton's Amer. Crim. Law, sec. 2369; 2 Ralls' Ab., 84, sec. 15; 2 Burns' Jus., 222; 1 Hawk's Bl. Cro., 365; Taggart vs. The Commonwealth, 9 Harris, 527.

Indeed, there was no other way by which a *public nuisance* could be abated, by process of law. There was an old writ, called an *assize* of nuisance, by which a private nuisance against a freehold might be abated, but as to public nuisances, an indictment was the only remedy, except by the act of a person taking the law in his own hands: 2 Bouv. Inst., 577, 579. Our statute, defining an *abatable* nuisance, defines an *indictable* nuisance, save that it adds "immediate,"

"manifestly" and "greatly," before the words, "annoyance," "public health" and "public morals," and was evidently intended not to authorize the abatement of an act which was not indictable, but to authorize the abatement of indictable nuisances of peculiar virulence, without waiting for an indictment: Section 4023, 4478, Revised Code. It is a public proceeding, in behalf of the public, and, according to section 2946 of the Code, it ought to be in the name of the State. It is true that sections 4023 and 4024 do not point out what particular form shall be used, nor would we insist that any particular form is necessary; but the whole scope and design of the law indicates that it is a proceeding in behalf of the public, to cure a public wrong.

We hold, therefore, that the use of steam on this railroad is specially permitted by the public authorities, and that it cannot, therefore, be abated as a nuisance. If, in this use, acts are done beyond the scope of the permission, as if the use be in a manner not contemplated by the public authorities, as deduced from the language used, we do not doubt but that equity will restrain it within the bounds prescribed. How far—this permission to so use the public street—this condonation by the public authorities of the nuisance—affects the right of any individual who has received damage by the use, we do not decide. The question is not before us, and it has difficulties we do not feel called upon to settle, until the question legitimately arises.

Judgment affirmed.

Bonaud *vs.* Genesi.

A. BONAUD, plaintiff in error, *vs.* C. GENESI, defendant in error.

1. The holder of a promissory note as collateral security, who takes it without notice, stands upon the same footing as any other innocent purchaser without notice.
2. It is only when the Judge of the Superior Court has committed some error of law, or has abused his discretion in judging of the facts, that this Court will interfere with his judgment in refusing or granting a temporary injunction.

Promissory Notes. Collaterals. Injunction. Before Judge CLARK. Macon County. February, 1871.

Bonaud alleged as follows: He and C. Genesi, of New York, were partners in Savannah, Georgia, dealing in guano, etc., under the firm name of "C. Genesi." For the use of the firm, he contracted debts, in borrowing money, etc., which the firm used. The firm sold largely and took paper, payable to the order of C. Genesi, which Genesi gave him a power of attorney to collect and apply to the payment of the firm debts, the claims all being in the hands of the firm's agents in Georgia. Genesi has pretended to transfer said papers to Goodkind & Brother, Moore *et al.*, of New York. The firm debts are unpaid, the firm is sued on some of them, and judgments are rendered which bind all the firm assets and all Bonaud's property. The transfers are but colorable, Genesi has no property in Georgia. He prayed that any disposition of said papers inconsistent with his rights be enjoined. Temporary injunction was granted. Genesi answered, denying that he ever was Bonaud's partner, explaining how they were connected in business, saying he paid Bonaud to act for him as his agent only, etc. And he and said transferees answered, that he sold some of the paper to some of them, in due course of trade, as his own, for value, and, in some way, transferred other of said paper as collateral for his obligations, and that these transferrees had no knowledge that anybody but Genesi had any interest in said paper.

Upon the coming in of these answers defendants moved to dissolve the injunction. On the hearing, many affidavits and letters were introduced to sustain the charges in the bill. The Chancellor dissolved the injunction, and that is assigned as error.

P. Cook; N. A. Smith, for plaintiff in error. As to dissolution of injunctions: 12 Ga. R., 5; R. M. Charlton's R., 358; 34 Ga. R., 135, 289. As to purchasers without notice: R. Code, sec. 1903.

Nesbit & Jackson; Hawkins & Burke, for defendants.

McCay, J.

By the answers of these defendants, Brown is the actual purchaser of the drafts, *bona fide*, and without notice. The Goodkinds are the holders, as collateral security. If innocent holders, they stand, by section 2746 of the Revised Code, on the same footing as any other innocent purchasers. If they have given credit on them, put themselves under new obligations, by virtue of their receipt, they are protected.

Taking all these answers and affidavits together, we are not prepared to say that the Judge has abused his discretion in refusing this injunction. The most that can be said for the complainant is, that he has gotten a case of suspicion against the claimants to these drafts. If they tell the truth, they are innocent purchasers without notice. The complainant's case turns almost entirely upon the suspicion of untruth he has undertaken to cast upon the answers. We do not say that he has been entirely unsuccessful in this effort. Indeed, if the Judge had granted the injunction, we are inclined to think we would not have disturbed his judgment. But, as he has refused it, we will not disturb that either.

The granting or refusing an injunction is in the wise discretion of the Chancellor. His judgment is not error unless he acts illegally. This Court, as we have said in many cases,

is not a Court of appeals, to re-hear questions of fact, and judge of them *de novo*. It is only when the Court below acts illegally that this Court will reverse the judgment.

We desire to say that, in the granting and refusing injunctions, until the hearing, the Judge of the Superior Court is clothed, by the law, with a discretion. If this Court undertakes to reverse his judgment simply because we think the burden of the case is, on the facts, against his judgment, we should be ourselves assuming an original jurisdiction, not granted to this Court. The Judges of the Superior Court should be careful in these matters; examine, patiently and cautiously the facts, and act with deliberation and wisdom. We will always assume they have so done, and will not disturb the judgment on the facts, except in a clear case of mistake, misapprehension, or error of law.

Judgment affirmed.

Robert Baugh, Superintendent Western and Atlantic Railroad, plaintiff in error, *vs.* McDaniel & Strong, defendants in error.

The Western and Atlantic Railroad was sought to be made liable for the loss of eight bags of cotton sent from Atlanta to New York, and which the said road had delivered to the next connecting railroad on the line, and it appeared that the Western and Atlantic Railroad had given two receipts for two lots of cotton, portions of each of which lots were lost beyond their line. One of these receipts simply acknowledged the receipt of the cotton and that it was consigned to New York, by way of Johnsonville, and the other contained the same acknowledgment, but was headed: Western and Atlantic Railroad, East Tennessee and Georgia Railroad, Virginia and Tennessee, and Orange and Alexandria Railroads, and had indorsed upon it, "Through freight contract." And it was in evidence by the shipper that the cotton was delivered to be shipped to New York; also in evidence by the railroad that there was an arrangement between it and the other roads, fixing the amount that each road would charge for the carriage of freight

over its road, but no other arrangement, and that this was a through freight contract:

Held 1. That the Western and Atlantic Railroad having been built by the State to carry freight and passengers between Atlanta and Chattanooga, it is a matter of grave doubt if its officers can charge the State with a contract to carry freight beyond its terminus to distant points over other roads.

2. That, at any rate, such a contract will not be implied, but must appear to have been distinctly made.

3. That there is nothing in the evidence adduced in this case to make such a special contract, or to take the case out of the rule prescribed in section 2058 of the Revised Code, which is as follows: "Where there are several connecting roads under different companies, and goods *are intended to be transported over more than one railroad*, each company shall be responsible only to its own terminus and until the delivery to the connecting roads."

Railroad Companies. Common-carriers. Before Hon. JOHN COLLIER, Judge *pro hac vice*. Fulton Superior Court. October Term, 1870.

In the winter of 1865, McDaniel consigned two lots of cotton to New York, part of each failed to reach New York and was lost. They sued Baugh, as Superintendent of the Western and Atlantic Railroad. That it failed to reach its destination and was lost, its value, and a demand and refusal to pay for it were shown. The receipt for the first lot was in the usual form of a receipt by said railroad only, for the cotton "marked (McD & S.) consigned by McDaniel & Strong to A. C. Schaeffer & Company, New York, *via* Johnsonville."

The receipt for the second lot was headed: "Western and Atlantic, East Tennessee and Georgia, East Tennessee and Virginia, Virginia and Tennessee, and Orange and Alexandria Railroads. Through freight contract," and was for cotton "marked 'M. D.,' consigned by McDaniel & Strong, to A. C. Schaeffer & Company, New York."

Baugh testified, that this was a "through-freight contract;" that, at that time, he had agreed with the intermediate roads upon through rates of freight, upon cotton, from Atlanta to

New York; that the extent and object of this agreement was to determine the whole charge for carrying a bale of cotton from Atlanta to New York, and the proportion of that amount due to each road; that this was its only purpose, and it went no further.

It was shown that the cotton was all delivered to the connecting road, by defendant, in bad order, but what was meant by bad order, was not explained.

The evidence concluded, the Court charged the jury as follows: "The defendant is a common-carrier, and, in carrying goods, is bound to extraordinary diligence. In order to entitle the plaintiffs to recover, in this case, the evidence must show the delivery of the goods by the plaintiffs to the defendant, to be transported over the road of defendant, the loss of said goods and their value at the place of destination. If the testimony shows these facts, then the defendant is liable, unless they are excused by the act of God or the enemies of the State. (It was competent for the defendant to contract to deliver goods beyond the *terminus* of its road; if it did so in this case and failed, it is liable.) The receipt of goods marked to points beyond its termination is not sufficient, of itself, to raise the presumption that the defendants undertook to deliver the goods at the point of destination, but it ought to be shown, by the evidence, that the defendants contracted to deliver such goods at the point of destination. (If no contract of that sort has been shown, then the defendant is discharged, when he shows that he has delivered the goods to the connecting roads in as good order as when received for shipment.") The Court then charged, upon request of defendant, as follows: "The legal liability of the Western and Atlantic Railroad, under the contract, as relied upon, in this case, for loss or damage to the freights, ceased upon the delivery of the freights to the next connecting road, except for loss or damage done on the Western and Atlantic Railroad." And then added to said charge the following: "If, however, the defendant made a special contract to deliver the goods in

New York, he would be liable for any loss that occurred beyond the *terminus* of his road, or after delivery to the next connecting railroad."

The jury found for the plaintiffs. Defendant's counsel moved for a new trial, upon the grounds, that the Court erred in its charge, in brackets first above, and in adding "in as good order as when received for shipment," in its charge, secondly above in brackets, and in said addition to the requests of defendant's counsel. The Court refused a new trial, and error is assigned on said grounds.

MYNATT & DELL, for plaintiff in error. Defendant not liable for loss beyond its *terminus;* no railroad is: R. Code, sec. 2058. By contract, a railroad may be: 39 Ga. R., 636. But the superintendent of the State property must show special law to justify his contracts: 37 Ga. R., 240; 7 Cr. R., 366; R. Code, secs. 2153, 968 to 975, 2170. He has no such power. There was no evidence of special contract: 37 Ga. R., 103; 39th, 636. Delivery at *terminus* discharged defendant: R. Code, sec. 2058; 40 Ga. R., 422.

D. F. HAMMOND; ARNOLD & BROYLES, for defendant. Contract may bind common-carrier to deliver beyond *terminus:* 25 Ga. R., 228; 4 Seld, 37; 6 Hill, 157; 8 M. & W. R., 421; 3 E. L. and Eq. R., 497; 17 N. Y. R., 386; 29 Barb., (N. Y. R.,) 35; 18 E. L. and Eq. R., 553; 8 Exch. R., 341; Redf. on Car., secs. 183, 181, 190 to 197; 38 Ga. R., 519. So may Western and Atlantic Railroad: R. Code, secs. 968, 975, (1, 3, 9;) 38 Ga. R., 182. There was evidence of special contract: Redf. on Car., secs. 182 and note, 188, 189, 190, 191; 38 Ga. R., 519.

MCCAY, J.

1. Whilst we admit that the Western and Atlantic Railroad is, by its Superintendent, authorized to bind the State in all matters pertinent to its business as a railroad, yet we

have great doubts if it was ever contemplated that the Superintendent should have the right to undertake to carry freight or passengers beyond the line of the road. It might present an awkward question of State rights if such a practice were common. So great a corporation as the State of Georgia might be a very dangerous rival among common-carriers, if such a general power were recognized. For this reason, as well as from the want of any express power to so bind the State, we have great doubts if the Superintendent *could* make such a contract, and we are not disposed to *impose* such an one, in the absence of an express undertaking, to that effect.

But I do not put my judgment upon this ground alone. Although the current of common law authority is pretty decided, that the receipt of goods, destined for a point beyond its line, by a railroad company, charges the company with the duty of delivering the goods at the point of destination, notwithstanding the company's road may not extend so far, (See 3 English Law and Equity Reports, 497; 18 English Law and Equity Reports, 553, 557), yet it cannot be denied that this is a very unusual exception to the general charters. A railroad company is almost always chartered for the construction of and to build and *use* a road within defined limits; and it cannot, ordinarily, exercise its franchises beyond those limits. Its character as a common-carrier is incident to its charter and its business, and it is an anomaly that it can, even by positive contract, undertake to carry goods beyond its line.

This Court, in ..... *vs.* ....., held that the Macon and Western Railroad could not run a line of wagons to transport goods from its depot to the depot of the Central Railroad, a distance of not more than a mile. So that it is, as I have said, rather an anomaly, that though a railroad company cannot do this by its own wagons, it may undertake to carry goods any distance. Yet this is the current of authority: Redfield on Railways, 282; 8 Cowen, 223; 10

Rich., 382. The case in 22d New York Reports, 258, goes upon the ground of estoppel. It admits that the contract is illegal, but it having been expressly made and acted upon, the Court held the company bound on its contract, on the principles of estoppel; though SELDEN, Judge, denied even this, and concurred in the judgment on the ground that, though the contract was illegal, the company had committed a tort, in carelessly carrying the plaintiff, by which he was damaged.

But though this is the current of authorities at common law, it is clear to me that our Code, section 2058, alters this rule, so far at least as relates to that implied contract, which is raised by the mere receipt of goods destined to a point beyond the *terminus* of the receiving road. That section is in these words: "Where there are several connecting railroads, under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own *terminus*, and until the delivery to the connecting road; the last company which has received the goods as 'in good order' shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of the ultimate liability."

2. Perhaps if a company were to make an express contract to carry goods beyond its line, this section might not excuse it from a loss on a connecting road, but clearly, if nothing appear but that it was "intended the goods should be transported over different roads" each company is "liable *only* to its own *terminus*, and until the delivery to the connecting road."

What more appears here? The *most* that is proven is that these goods were to be transported to New York over several specified roads; *nothing* was said as to who should be responsible in case of loss or damage. Nor is there any special contract of the Western and Atlantic Railroad to do the transportation over the whole route. At common law such

an undertaking would be implied from the mere receipt of the goods by the Western and Atlantic Railroad as a common-carrier. But, if section 2058 of the Code means anything, it must mean that such an implied contract does not arise in this State. The common law reasons thus: "You are a common-carrier; you have received these goods, openly destined for a distant point; you have not limited your obligation; the law implies that you have undertaken to carry them to the point they are intended to be transported to." This section says directly the contrary, and declares that when goods are intended to be transported over more than one road, each company shall be responsible only to its own *terminus*, and until delivery to the next road."

3. What is there in the evidence in this record to indicate any special contract, any undertaking by the Western and Atlantic Railroad, that *it* undertook to transport this cotton to New York. The plaintiff says the goods were delivered for transportation to New York. It is a fact, too, that the receipt says consigned to New York, but is this any more than is covered by the words of the statute, "if the goods are intended to be transported over different roads." We think not. It will be noticed, too, that the case provided for by this section of the Code, is clearly a case where the roads are each chargeable beyond their *line*. Ordinarily, a railroad only transports goods to its own depot, and there holds them until called for. If goods are sent from Atlanta to Chattanooga, the road transports them to its depot at Chattanooga, and holds them till called for. But when goods are intended to be transported over more than one road, the receiving road is bound to "deliver" them to the connecting road on the line. Very clearly the very case here before us is contemplated, to-wit: when it is distinctly understood that the thing is to be transported over several roads. The agent, it is true, says this was a through contract, but he defines what he means by this. He says there was an agreement between the roads, that through freight should go over each

road at a lower rate than ordinary freight; and this, he says, was all he means by a through freight contract.

Upon the whole, we are clear here was no evidence of any express undertaking by the Western and Atlantic Railroad to carry this cotton to New York. All that can be said is, that it was understood that it should be transported over several connecting roads to New York. In such cases, the Code provides that each road is only liable over its own road, and until delivery to the next road. There was nothing in the evidence to justify the charge, as to the liability of the road, on a special contract. There was, in fact, no special contract, except as to the rate of freight. The goods were received, consigned to New York, to be transported over several defined roads to New York, and the only obligation upon the Western and Atlantic Railroad, beyond its *terminus*, that could arise, would be the obligation, implied by the common law, that the receipt of goods, destined for a distant point, raises an implied obligation in the carrier to deliver them at that point. But as we have seen, our Code changes that rule, and holds each company liable only for the delivery to the next road.

The question of public policy, raised on the argument, can have no force against the express words of the statute. But it seems to us that the policy is with the statute and with the construction we give to it. It may be very convenient for one of our citizens, who ships goods, in case of loss or damage, to sue the road to which he delivered them, and thus obtain his redress at home. But it must be remembered that the people of this State are also large shippers, from other points here, and in case of a loss on one of our roads, it is a great public convenience to have the right to seek redress here, and not be driven to sue in New York, or Kentucky, or Tennessee, or other place of shipment. Each road receipts to its connecting road for goods, and the statute holds each road until it produces a receipt, in "good order," from the next road. Through freights, without stoppage, without in-

termediate consignees, and without change of bulk, are a great public good, and we think public policy lies in encouraging the practice, rather than discouraging it by holding the receiving road liable for losses beyond its *terminus*.

Judgment reversed.

LOCHRANE, C. J., concurring.

The facts of this case have been recited, and I will not repeat them, but confine myself to the question of law involved in the case, remarking that this is an important question upon its legal principles and public policy.

In my opinion the liability of railroads in Georgia is defined by section 2058 of the Code, and nothing but an express contract will enlarge or extend the liability beyond the *terminus* of the road and delivery to the connecting road. I am not unaware of the construction which may be given to this section of the Code, as deduced from its concluding provisions, that it was intended only to regulate the liability of the connecting roads with each other and define the responsibility of the last road receiving the property, in good order, to the consignee.

After a careful consideration of the law, I am not prepared to give it this limited construction. Its language is: "When there are several connecting railroads, under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible *only to its own terminus* and until delivery to the connecting road." This language is plain and unambiguous; "shall be responsible only to its own *terminus*," has neither qualification nor condition. It speaks the will of the Legislature on the law of railroad liability: "The last company which has received the goods, as in good order, shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the ultimate liability."

This provision and its reasons of justice and convenience

strike me with satisfactory clearness. It specifies the road the consignee may recover against, upon goods damaged, leaving the roads to settle among themselves their respective liabilities. But the first part stands separate and independent, *not upon a question of damage done to goods, but the liability of the road generally for loss or damages* to the extent of its own line only, and until delivered to the connecting roads.

This is the contract liability fixed by law under the Code; and, except there be a special contract to carry goods beyond the terminus of the road, the liability of the carrier is ended at his *terminus* by delivering the goods to the connecting road, if intended to go farther.

With the view I entertain of the law I hold that the contract to carry beyond the *terminus* must be special. It will not be implied. My reason for this opinion is, that the law will not imply a greater liability than it imposes, and, in the absence of any express contract, the *lex loci* will govern in implications arising upon the construction of contracts under it.

Again, the law of common-carriers is a law based upon public policy of interest and convenience; and, when settled by rule or statutory provisions, presumption will be in favor of conformity therewith, except expressly negatived by the special contract.

Again, railroad corporations will be construed within the limits of their charters. And if the law governing common-carriers is a law based upon public policy, it is a rule that contracts made by corporations against that policy would be held *ultra vires*. In 40*th Georgia Reports*, 624–5, this Court, referring to the aptness to forget the fundamental law, says: "They are apt to slide into the notion that a corporation is an individual in all respects so far as business matters are concerned." New and distinct enterprises not declared in the charter, under a pretence that they are in furtherance of the declared design, involving new risks to its stockholders, and not fairly within the terms of the original

grant, are forbidden. And covering this question, construing the law governing charters, we lay it down, that the general law of this State applies to them where there is no chartered privilege or grant conflicting, or where it is silent; and that it moves within the sphere of the general law of the land, subject to its provisions and entitled to its protection. In the case before us, I therefore hold, that the contract to carry beyond the *terminus* of the road, if permitted by the law, and from this permission not *ultra vires*, will only be held binding where the contract is express. It will not be implied.

This leads me to another view of the case at bar. This action is brought against the Superintendent of the Western and Atlantic Railroad. Under what power could he enter into a special contract to be liable for loss of goods beyond the *terminus* of the road? We apprehend if the general law applies to other corporations it applies with more than ordinary power over this enterprise.

It is not necessary to enter into any detailed history of the legislation under which the State road has been governed. The Code defines the powers of the Superintendent, section 975. And in view of the section 2058, defining liability, there is no power granted or given to him to enter into new risks or bind the State for losses over or beyond the line or *terminus*. It is not there, nor is it incident or essential to his duties as enumerated. Such power will not be implied, in face of the general law: 37 Georgia Reports, 240. For myself, therefore, I hold that the delivery of plaintiff's cotton at the *terminus* of the Western and Atlantic Railroad, under the proof in this case, ended the law of liability of the road.

But we hold, under the facts in this case, there was no special contract proven. If A delivers goods to B, a common-carrier, directed to a pointed beyond the *terminus* of B.'s road, and B receives them and receipts for them under such directions and destination, B is not bound by such a re-

ceipt as a special contract to deliver them at their destination, but fulfils his contract by their delivery at the *terminus* of his road to the railroad connecting *en route*. I have considered the cases in England and this country found in the Reports; but feel controlled by the Code of this State in construing the effect of such receipt for destination beyond the *terminus*. In this case the argument *contra* is based on the fact that the receipt given was headed "through freight contract." Does this heading authorize the construction of the special contract set up? Was it contracted that the Western and Atlantic Railroad would be liable for the delivery of the goods in New York? The Superintendent swears that it was not. He had entered into an arrangement with connecting roads for a *pro rata* of freights as between themselves; and this was the extent of his arrangements. He offered the facility of connecting roads to shippers, but it is not expressly stipulated that he bound his line for the delivery at destination. Could such a construction be contemplated? Was it actually understood? Was there any fair opportunity so to believe? Does any man deal with railroads on any such view of their liability in Georgia? Express companies do so contract, and this distinguishes their business from *railroads* that run only their cars and custodians to their *terminus*.

When we say the Western and Atlantic Railroad contracted to deliver their cotton to the consignees in New York, and to be liable for its loss, except occasioned by the act of God or the public enemies, how do we arrive at such a conclusion except by presumption based on the common law liability of common-carriers?

This I hold insufficient. The law of liability governs unless changed by contract liability expressly stipulated. Nowhere can I see enough to change the liability imposed by law, under the Code, and substitute a different liability against the law and the powers of the party to stipulate for greater risk.

Again, if this contract be construed under the testimony, if such be held as a special contract, under the law of common-carriers, then the Western and Atlantic Railroad assumed the transportation and risk over other roads without hire; for its *pro rata* paid only for the transportation to its terminus. Turn this case as we will, we arrive finally at the same conclusion. But, not desiring to swell this opinion beyond the necessary enunciation of the principles and reasons we announce and entertain, we will here close our concurrence with the judgment pronounced by the Court.

WARNER, J., dissenting.

This was an action brought by the plaintiffs against the Superintendent of the Western and Atlantic Railroad, to recover the value of eight bales of cotton alleged to have been delivered by the plaintiffs to the defendant at Atlanta, to be transported to Schaefer & Company, New York, which were lost. The original railroad receipt given for the cotton was also lost; there was a substituted receipt offered in evidence, signed by the agent of the road, dated 1st November, 1865, headed: Western and Atlantic, East Tennessee and Virginia, Virginia and Tennessee, and Orange and Alexandria Railroads, *through freight contract*, for thirty-seven bales of cotton, consigned by McDaniel & Strong to A. C. Schaefer & Company, New York. One of the plaintiffs testified, that the cotton was delivered to the Western and Atlantic Railroad for transportation to their agent in New York, that eight bales of the cotton had never been received there, by their agent. Baugh, the then Superintendent of the road, testified, that at the time the cotton was shipped, he had made an agreement with the intermediate roads from Atlanta to New York, for through rates of freight on cotton, and that this was a *through-freight contract.* The Court charged the jury "that it was competent for the defendant to contract to deliver goods beyond the *terminus* of its road, and if the defendant did make a special contract to deliver the cotton

in New York, he would be liable for any loss that occurred beyond the *terminus* of his road or after delivery to the next connecting road." To which charges of the Court, the defendant excepted. Under the provisions of the 975th section of the Code, the Superintendent of the Western and Atlantic Railroad had the power and authority to make a contract with the shipper for the transportation and delivery of goods beyond the *terminus* of its road: 25th Georgia Reports, 228. The 2058th section of the Code regulates the liability of *connecting* railroads in this State, when the goods are intended to be transported over more than one railroad, to the *consignee* thereof; that is to say, if goods are shipped from New York to Macon, *via* Western and Atlantic Railroad, and should be lost between Chattanooga and Macon, and the consignee should sue the Western and Atlantic Railroad for them, and prove the receipt of the goods by the latter road, it would be a good defense to show that the goods had been safely transported over that road, and delivered in good order to the Macon and Western Road. By the 2040th section of the Code, which adopts the common law rule, the carrier is liable for the loss of the goods, unless it was occasioned by the act of God, or the public enemies of the State. If the Western and Atlantic Railroad had received goods at Chattanooga to be transported to Macon, and the same had been lost, and that road had been sued by the consignee thereof, for the goods, it would not have been a good defense under the common law rule, to have shown that the goods had been delivered to the Macon and Western, a connecting road; but the 2058th section of the Code changes that common law liability so far as to allow the Western and Atlantic Railroad to show that the goods were delivered to the connecting road in good order, and makes the last company, receiving the goods in good order, responsible to the consignee therefor; that is the legal effect of the 2058th section of the Code. But if the Western and Atlantic Railroad makes a special contract with the shipper, that he will transport his goods from

Atlanta to New York, and the goods are lost beyond the *terminus* of this road, the defendant would be liable on his contract of bailment, for the loss of the goods. "Bailment to deliver, is a delivery of goods in *trust* upon a contract expressed or implied, that the trust shall be *faithfully* executed on the part of the bailee. If money or goods be delivered to a common-carrier, to carry from Oxford to London, he is under a contract in law to pay or carry them *to the person appointed*:" 2d Blackstone Commentary, 451–2; 3d Blackstone Commentary, 163; Code, 2032. The responsibility of the carrier commences with the delivery of the goods to himself or his agent, and ceases with their delivery at destination according to *the direction of the person sending*, or according to the custom of the trade: Code, section 2044. There is sufficient evidence in the record in this case, of an express contract on the part of the road to transport and deliver the cotton in New York, the point of destination, to authorize the charge of the Court to the jury, and the jury, by their verdict, having found that there was such a special contract, under that evidence, a new trial ought not to be granted.

DAVID B. HARRELL, plaintiff in error, *vs.* ROBERT J. GRIMES, defendant in error.

The bill of exceptions in this cause was dismissed because it was not served till the eleventh day after it was certified by the Judge below. (R.)

HAWKINS & BURKE, by R. H. CLARK, for plaintiff in error.

E. H. BEALL, J. L. WIMBERLY, by A. HOOD, for defendant.

POLLY WYNN, plaintiff in error, *vs.* S. J. BENNING, administrator, defendant in error.

If the bill of exceptions be changed by the Judge *after* service is acknowledged upon it, it must be served anew. (R.)

This bill of exceptions *appears* to have been certified on the 11th of July, 1870. Service was acknowledged upon it on the 16th of July. It appears to have been changed after the original draft, and the certificate of the Judge is dated 30th of July, 1870—thirty being written over eleven. Counsel for defendant said that the bill of exceptions had been changed since said acknowledgment, and had thereby become a new cause, and the old acknowledgment did not apply to it. It was dismissed for want of service.

RAMSEY & RAMSEY, for plaintiff in error.

H. L. BENNING, M. J. CRAWFORD, for defendant.

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[The Head-notes, except those followed by (R) are made by the Judges.]

ABATEMENT.

An action at law does not abate by the bankruptcy of the plaintiff, and if the assignee in bankruptcy be discharged, without any interference by him with the suit, it may proceed in the name of the bankrupt, the presumption, in the absence of any proof to the contrary, being that the action is proceeding for the benefit of the true owner, whoever he may be. *Conner vs. Southern Express Company*..... 37

ACCEPTANCE. See *Banks.*

ACCESSORIES. See *Criminal Law*, 10.

ACCORD AND SATISFACTION.

See *Non-suit*, 4.

ACKNOWLEDGMENT OF DEED.

See *Ejectment* 5.

ACQUIESCENCE.

See *Ejectment*, 2, 3.
" *Estoppel*, 2.

ACTIONS.

See *Joinder of Actions.*
" *Pleadings.*

ACTUS DEI. See *Common-Carriers*, 1.

ADMINISTRATORS AND EXECUTORS.

Where there was a contest between two creditors, for the administration of the estate of their debtor, and it appeared that W. was a creditor for $2,000,00, and

F. a creditor for $150 00, that both were creditors by promissory note, and that the estate was insolvent:
Held, That it was error in the Court to exclude from the jury, evidence that a large portion of the other creditors, some of whom were judgment and mortgage creditors, preferred the appointment of F. Whilst such preference was not imperative, it was still matter proper for the consideration of the jury. *Freeman vs. Worrill*..... 401

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ADMISSIONS.

See *Continuance*, 1.
" *Ejectment*, 6.

AD VALOREM. See *Taxation*, 2, 3.

AFFIDAVITS.

See *Bill of Exceptions*, 1.
" *Landlord and Tenant*, 1, 6.
" *Evidence*, 2.

AGENCY. See *Principal and Agent.*

AMENDMENTS.

There was no defense to an action on a promissory note and judgment was rendered thereon, and a motion was made at the same term of the Court to set it aside, on the grounds that it was not signed by the plaintiff's attorney, but by the Judge, as provided by the 38th rule of Court, that the plaintiff was not stated in the judgment as "administratrix," and because the judgment did not recite the fact that Wright was "security." The Court overruled the motion and allowed the judgment to be amended so as to insert the word "administratrix," as to the plaintiff, and the word "security," as to the defendant, Wright:
Held, There was no error in overruling the motion to set aside the judgment and allowing the same to be amended. *Wright vs. McBride*..... 234

2. An action of ejectment was instituted in the name of a trustee of a married woman against the defendant, to recover the possession of a tract of land, the title

to which was claimed under a marriage settlement deed. The demise in the declaration was alleged to have been made by the lessor of the plaintiff in the name of the trustee of Melvina Adams, a *feme covert.* During the pendency of the suit, the husband of the *feme covert* died, and on the trial of the case, the Court allowed the declaration, on motion of plaintiff's counsel, to be amended, by striking out the name of the trustee, so as to leave the demise in the name of Melvina Adams as the plaintiff's lessor:
Held, That, under the provisions of the Code, there was no error in the Court in allowing the amendment, inasmuch, as on the death of the husband, the legal and equitable title to the land was in the widow, and that she could recover in her own name by showing title to the land in herself as the plaintiff's lessor. *Childers vs. Adams*..... 352

APPEALS.

1. Where, in a controversy before the Court of Ordinary as to who should be appointed administrator, the Court appointed H., who was an heir-at-law, and he failed to give security, after time granted him for that purpose, after which, as between W. and F., both claiming on the ground of being principal creditors, the Ordinary appointed F., and W. appealed to the Superior Court, and, at the Court, H. claimed the right to the administration, and the Court held that he was estopped by the proceedings before the Ordinary appointing him, and his failure to give the security:
Held first, That the appeal from the Court of Ordinary brings up the whole record, and all the parties cited to appear in the Court of Ordinary are parties to such appeal; but the issue before the jury is on the judg- of the Court, and such parties may unite with the appellant upon the trial of such issue, or may submit their own claims with his, as having precedence and right, in law, to such administration, and are not confined on the appeal to assert the rights of either contestants, but on the appeal, which is in the nature of a *de novo* investigation, may submit their superior claim or claims. *Howard vs. Worrill*..... 397
Held again, Under the facts of this case, H. had no

right to participate in striking the jury; the appellant and the party contestant appointed by the Ordinary were the parties before the Court, whose rights in selecting a jury were incident to such appointment and appeal; and inasmuch as there were no other parties before the Court, and H. had already been heard in the Court of Ordinary, and failed, from inability, to avail himself of the judgments in his favor, and such judgment was, by a Court of competent jurisdiction, and not appealed from by others, it was not error in the Court to refuse to submit his claims for administration; for that question had been decided, and he was estopped by the decision and his failure to conform to it. *Ibid.*

ARBITRATION.

An award of arbitrators under the arbitration law will not be set aside on the ground that it is illegal, because contrary to the evidence, unless it be so contrary to the evidence as to require the inference that it is the result of fraud, accident, or gross mistake of law or fact on the part of the arbitrators; and if an award has been attacked upon this ground before the Superior Court, under the provisions of section 4184 of the Revised Code, and the question has been submitted to a jury, who have found in favor of the award, and the Judge has refused a new trial, it must be a very strong case, indeed, to justify this Court in overruling the Judge and directing a new trial. *McCollough vs. Mitchell*..... 495

ARREST OF JUDGMENT.

See *Criminal law*, 9, 10.

ASSIGNEE. See *Bankruptcy*, 1.

ATTACHMENT.

When a contract was made by a freedman and a landlord, to make a crop for one year, by which the landlord was to furnish the land and stock, and the freedman to work the same, and to receive for his labor one-half of the crop made thereon:

Held, That such a contract did not make them partners, and that if the landlord refused or neglected to pay

or deliver to the freedman, the one-half of the crop made on land, but appropriated the same to his own use, the freedman could make out an account against the landlord for the value of his share of the crop, and enforce the same by attachment, or otherwise. *Holloway vs. Brinkley*..... 226

ATTORNEY AT LAW.

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BAILMENT.

See *Common-Carriers.*
" *New Trial.*
" *Western and Atlantic Railroad.*

BANKRUPTCY.

An action at law does not abate by the bankruptcy of the plaintiff, and if the assignee in bankruptcy be discharged, without any interference by him with the suit, it may proceed in the name of the bankrupt, the presumption, in the absence of any proof to the contrary, being that the action is proceeding for the benefit of the true owner, whoever he may be. *Conner vs. Southern Express Company*..... 37

Section 2121 of the Revised Code, of this State, providing that "the obligation of the surety is accessory to that of his principal, and if the latter, from any cause, becomes extinct, the former ceases, of course" is an affirmance only of the common law, and by the words "from any cause" is meant any cause dependent on the act or negligence of the creditor, and not such a cause as the discharge of the principal under the bankrupt law, which is beyond the control of the creditor, and by force of the laws of the land. *Phillips vs. Solomon*..... 192

BANKS.

Inasmuch as the plaintiffs' intestate accepted the check of Jones, the treasurer, for the balance due him on certificate of deposit, the bank was only bound to pay that check in such funds as Jones, the treasurer, had

on deposit therein, and if the holder of that check declined or refused to receive in payment thereof such funds on its presentation, that was not such an appropriation of the funds of the drawer of the check in the hands of the bank to the payment of the plaintiffs' debt, as would preclude the bank from paying over to the drawer of the check the balance due him by the bank in closing up his account; the plaintiff, by his own act, refused to have the funds of the drawer on deposit in the bank appropriated for the payment of that check, conceding that the offer of payment in Confederate Treasury notes was an acceptance by the bank to pay the check in that currency. The facts of this case do not show such a *wanton* or *fraudulent* refusal of the bank to pay the holder of the check in the funds deposited by the drawer thereof as would make the bank liable. *Lester vs. The Georgia Railroad and Banking Company*..... 244

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1. If affidavits used on the hearing of an equity cause are part of the record they need not be copied in the bill of exceptions. (R. See end of report.) *Cohen vs. Myers, Cohen & Company et al*..... 46
2. A rule against a sheriff for money, and an attachment for not paying over that money, all occurring at the same term, are the same cause, and may be joined in one bill of exceptions. (R. See end of Report.) *Martin vs. Huson* 83

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CESTUI QUE TRUST. See *Trustees.*

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See *Criminal Law*, 13.

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1. It is not error in the Court below to refuse to make a charge requested in writing, if the same be not pertinent to the evidence. *Camp vs. Phillips*..... 289

2. When a distinct issue is presented in the pleadings, it is not error in the Judge to charge the law in relation thereto, though the evidence be very slight upon that particular point. *Ibid.*

3. It was error in the Court, in its charge to the jury, to express or intimate its opinion as to the evidence in the case, under the provisions of the 3183d section of the Code, and in not charging the jury as to the ratification by defendant of the sale of the corn by plaintiff to defendant on his credit, under the evidence contained in the record. *Ketchum vs. Verdell*..... 534

4. When the Judge charged the jury, in his opinion A had an insurable interest:

Held, That this was an improper mode of presenting the case. He ought to have called the attention of the jury to the facts, and then stated: "If you believe, etc., then in the opinion of the Court, under the law, you will find that he had an insurable interest." But under the facts in this case, we regard the statement rather as a legal conclusion, than an opinion on the facts; and as the case was clearly made out, we do not think it sufficient ground to reverse the judgment. *The Southern Insurance and Trust Company vs. Lewis and Brothers*..... 587

5. When the facts of the case show clearly that the *act* of the killing was without any legal provocation, and, in fact, constituted the crime of murder, under the law:
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COMMON-CARRIERS.

1. An unusual and extraordinary flood in a river is such an act of God as excuses a common-carrier from his liability at all events, for goods he has undertaken to transport; but even in such a case, the carrier is bound to exercise the care of a very prudent man to preserve the freight entrusted to him for carriage. (By two Judges.) *Wallace, Superintendent, vs. Clayton*..... 443

2. Diligence, and the want of it, are questions of fact, to be determined by the jury, under the evidence and the charge of the Court, and a new trial ought not to be granted by the Circuit Judge, unless the jury find strongly and decidedly against the weight of testimony. *Ibid.*

3. A suit was brought against the Western and Atlantic Railroad for the loss of personal property delivered to them at Dalton for transportation to Atlanta, and plaintiff proved that the property sued for was put on board the railroad cars, and was lost. The evidence for the defense consisted, in part, of an original receipt, produced by plaintiff, or notice, as follows: "Received of Mr. W. C. Sanders, (stating the property,) for shipment to Atlanta, at his own risk," and the testimony of the agent, which showed that, at the time, General Johnston's army was in Dalton, and the cars were taken by the military at their pleasure, and that shipment of private freight was generally understood to be at the owner's risk, and that all shippers knew it was not uncommon for

the military to take the cars and throw such freights out, and that he believed defendant knew of the risk, and that he had to take it. It further appeared that the car loaded with plaintiff's goods at Dalton, consisting of a wagon, two mules and a horse, was found next morning in Atlanta, loaded with Confederate horses, a part of the wagon found lying near the depot at Dalton. Upon this statement of facts, the Judge charged the jury that the stipulation in the receipt, that the property was shipped at owner's risk, was no protection to the road unless the property was proven to have been taken by the Confederate army from the cars, and the jury found for the plaintiff, and the Court below refused a new trial:

Held, That the charge of the Court, under the facts, was too narrow a view of the law providing for express contracts by railroads; that while the general proposition of law laid down is in the language of the Code, there were facts in this case arising not only from the presence of an army, but the character of the receipt given, and the evidence of the agent as to plaintiff's knowledge and consent thereto, which ought to have been submitted to the jury under the evidence, to say whether or not he had knowledge of the contents and consented thereto; for this would limit the liability, if the jury believed from the evidence that it was an express contract. And whether it was or was not, was a fact for the jury, which ought to have been submitted to them under all the evidence in this case. *Wallace, Superintendent, vs. Sanders*.....

4. *Held, again*, If the jury were satisfied, from the evidence, that the car was taken by a superior force, which the defendants could not resist, still it was the duty of the Court to instruct the jury touching the requirements of care of the goods by the defendants after they were thrown out of the car, or the existence of such circumstances as prevented its exercise, and that the jury ought to have the whole matter fully before them, upon the law applied to the facts; 1st, as to whether there was an express contract between the parties; and, 2d, as to the care taken, if any, or reason why it was not done by the defendant or its

agents, relative to the goods, if the jury believed they were thrown off by the military authorities. *Ibid.*

5. One who keeps a ferry for his own use and for the convenience of customers to his mill, but who charges no ferriage, is not a common-carrier, and is only bound to ordinary diligence.—*Self vs. Dunn & Brown*..... 528

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See *Ordinance of* 1865.
" *Relief Acts of* 1868 *and* 1870.

CONFESSIONS. See *Criminal Law*, 16.

CONSTITUTIONAL LAW.

1. An indictment, which alleged the offense to have been committed on the 13th day of August, 1868, and found by a grand jury, drawn according to the laws of this State which existed prior to the adoption of the Constitution of 1868, was a legal and valid indictment, though found subsequent to the date thereof. *Anderson vs. The State*..... 9

2. The Act of 1870, declaring a single person to be the head of a family, is not a judicial construction of the Constitution; the judiciary, under our government, is alone empowered to interpret the Constitution and laws, and, with great deference to the Legislative Department of the State Government, we hold that it is not competent to enact that a single person living to himself or herself is the head of a family within the meaning of Article VIII., section 1, of the Constitution, but the decision of this Court on that subject is paramount. *Calhoun vs. McLendon*..... 405

3. That portion of the General Tax Act, of 1869, which levies, for educational purposes, a specific tax of twenty cents per gallon on every gallon of brandy, gin, whisky, or rum, whether foreign or domestic, *sold* by any person in this State, in quantities less than thirty

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gallons, and which provides the mode by which returns shall be made for each quarter of the sales in *every* year, and fixes the penalty for failing to make the returns required, is within the power granted to the Legislature by Article VI., section 3 of the Constitution, and is not controlled by section 27 of the Bill of Rights. WARNER, J., dissenting. *Kenny vs. Harwell. Myer et. al. vs. McGowan*..... 416

4. When, in a rule against the sheriff, he answered that he had not made the money, because the *fi. fa.* issued upon a judgment founded on a note given for negro property, which was admitted on the hearing:

Held, That, while a sheriff is a ministerial officer, and it is his duty to execute all process placed in his hands, and let defendants set up their defenses to such process, yet, under Article V., section 17 of the Constitution, and Article XLI., section 6, there was no jurisdiction in the Court, upon such answer, to make the rule absolute against such officer, and that the exceptional character of the case and the constitutional inhibition of jurisdiction was protection of such officer in the premises against rule. WARNER, J., dissenting. *Rogers vs. Silas et. al* 541

5. A retail dealer in goods, wares and merchandise, who is also a retailer of spirituous liquors, and who has paid his license as such retailer of spirituous liquors, to the corporation of the city of Savannah, is not exempt from the special tax laid by the city of Savannah upon retailers of spirituous liquors, nor is such special tax upon retail dealers generally an illegal tax under the Constitution and laws of this State. *Burch vs. M. and A. of Savannah*..... 596

6. The Act of 1869, which extends the provisions of the fourth section of the Act to incorporate the Zebulon Branch Railroad Company (1851–52,) to all manufacturing companies and individuals, whether corporate or not, provided such company or individuals own both banks of the stream upon which the mills are to be erected, etc., and provides for the assessment of damages for such taking of lands as may be necessary, is unconstitutional in its provisions, as applied to individual owners of mills in this State. *Loughbridge vs. Harris*..... 501

Held, again, Under Article III., section 5, part 1, of our present Constitution, and the grant of power to the Legislature to take private property for public use, that the exercise of this power is one over which the judiciary have jurisdiction to prevent its abuse. And to authorize the taking of private property by legislative act, two things must concur: 1st. It must be taken for public use only. 2d. It must be taken only upon provision for just compensation, except in urgent and extraordinary cases. And while we recognize the right of the Legislature to determine the necessity of the act, and when it is constitutionally exercised, and when it is for the public use, and provision for just compensation has been made, yet this is not a power which the Legislature can delegate to individuals, to erect mills or manufactories anywhere at their option, and in their judgment take private property for their use; and we do not think a mill, although it has some of the attributes of public use, and is regulated by law for certain defined purposes, can be regarded *such public use* as the Constitution recognizes, to authorize the exercise of this great constitutional power. *Ibid.*

. Where A filed his bill against a railroad company, alleging that they were proceeding to sequester a spring of water belonging to him a quarter of a mile of the line of the road, without his consent, and had laid pipes through his land to obtain it, and were using the water, and the bill asked for injunction, etc., and on the hearing the Judge dismissed the bill for want of equity:

Held, Under the facts alleged in the bill and upon the construction of the charter of said road, the Court erred in dismissing the bill, it not appearing that the water is indispensable and cannot otherwise be obtained, and upon the view that there is, *prima facie,* a case made for equity jurisdiction entitling the complainant to a hearing. *Strohecker vs. The A. and C. Railroad Company*..... 509

ee *Continuance,* 4, 5, 6.
" *Criminal Law,* 11.

CONTINUANCE.

1. When a motion is made to continue a case for the purpose of procuring testimony, the Court may require the showing to be reduced to writing and sworn to by the party moving the continuance; but if the opposite party will admit and does not contest the truth of the facts expected to be proved, the continuance should not be allowed. But it is error for the Court to overrule the motion for a continuance on the ground, that the opposite party will simply admit the facts expected to be proved, and then allow such opposite party to contest the truth of the facts admitted. To avoid the continuance of a case for the purpose of procuring testimony upon a proper showing made therefor, under the 3472d section of the Code, the opposite party must admit, in writing, the facts expected to be proved, and agree that he does not *contest the truth thereof.* *Cheeney vs. Smith & Alexander* 50

2. There was no error in the Court below in overruling the motion for a continuance of the case, on the showing made therefor, (to-wit: that defendant was absent, when it was not shown what he would testify to if present. R.) *White vs. Blasland*..... 184

3. The motion for a continuance of the case was properly overruled on the statement of facts contained in the record, to-wit: the absence of the party. *Ponder vs. McGruder*..... 242

4. Where a case was continued at the first term for providential cause, and before the succeeding term the plaintiff in error died, and there was no representative of his estate, and when the case was called upon the docket, the death of such plaintiff was suggested, and motion was made to dismiss the case upon the ground that the constitutional provision requiring the Supreme Court to dispose of every case at the first or second term after writ of error brought, was imperative, and that the Rule of Court, where its application extended the hearing over or beyond the second term, was in violation of the Constitution:
Held, That the mandate of the Constitution relative to the disposition of cases, did not apply to such as fell within the rule of providential cause; that by the Act of organization of this Court, and the Seven-

teenth Rule adopted under the old Constitution containing a like imperative provision, requiring the Court to "dispose of and finally determine each and every case on the docket of such Court at the first term" after writ of error brought, the provision relating to the making of parties in case of death, was the legal and proper construction of the Constitution in this regard, as provided for in the adoption of this Rule. *Worthy vs. Tate* 392

5. The Constitution does not imperatively require the disposition of cases where the parties have died without affording the means of compliance with the Rules of this Court, and parties representative can be instituted to prosecute or defend the legal rights of the deceased. *Ibid.*

6. *Held, again,* That at the first term succeeding the death of a party, it is not necessary to show diligence, in this that the death was so recent that parties could not have been procured to administer or qualify to bring the case within the rule of continuances, even under our holding that a temporary administrator may be made a party to carry on the suit. But the death of the party is, in itself, such providential cause as will authorize a continuance at the term next succeeding the decease, where there is no representative of the estate of such deceased party, without proof of diligence at that term, and at that term only. *Ibid.*

7. Continuances are in the sound discretion of the Court, and this Court will not disturb the judgment of the Court below, on a question of continuance, unless there be an abuse of the discretion vested, by law, in the Judge. *Merrill vs. Whitaker*..... 403

CONSTRUCTION OF STATUTES.

See *Constitutional Law.*
" *Husband and Wife.*
" *Principal and Surety.*

CONTRACTS.

1. The fact that a partnership engaged in the foundry business, took and executed a contract with the Confederate Government, to furnish certain munitions of

war, is not of itself sufficient to so vitiate the general proceeds of the business, as to render illegal a note given by some of the members of the firm to others, even though the note be based upon the proceeds of the general business. *Gullatt vs. Thrasher et al*..... 429

2. If the owner of a specific sum of money loan it to another, for a special purpose, as that the borrower shall pledge it to secure his forthcoming to answer on a bail bond, and the pledge is accordingly made:

Held, That when the bond is complied with, the orignal lender and true owner of the money may maintain assumpsit against the pledge for the recovery of the money. *Fischesser vs. Heard*..... 531

See *Insurance.*
" *Damages*, 3.

CONVEYANCES.

See *Trustees' Trust Estates*, 1, 2. 3, 7.

CO-OBLIGORS.

See *Equity*, 5.

COPYRIGHT.

See *Trade-marks.*

CORPORATION.

1. The fact of one becoming the owner of all the shares of stock and property of said company, did not, under the facts, render the corporation dormant, or forfeit the franchise of the company; and as long as the company, by its officers and agents or owner, carried on the business in the corporate name, it was by that name liable to suit for all contracts made in its name, and the right of suit exists until the liability so incurred was discharged, and it was not error in the Court to disallow testimony of dormancy, which would have been neither pertinent nor material. *The Newton Manfacturing Company vs. White*..... 148

2. When, in the progress of the case, evidence was rejected by the Court, to the effect that at the time the contract sued on was alleged to have been entered into by the defendant, a party was the owner in fact of the property of such Newton Manufacturing Company, evidence having been offered to show such dormancy of the corporation:

Held, Under the facts where the business was carried on in the charter name, with the knowledge of the said stock owner, and under such name the contract sued upon, by the agent of such company was entered into, that the evidence was not material to the issue in the case, as it made no difference as to the fact of who owned the property. If the business was carried on in the corporate name without notice to the public of such sale or transfer, the suit was properly brought against the corporation. *Ibid.*

3. In a suit against a stockholder of a Savings Bank by a depositor on his individual hability for the ultimate redemption of the deposits in proportion to the amount of the stock held by him in the bank, the stockholder may defend the suit by showing that, previously to the commencement of the suit he has discharged his obligation by paying to other depositors than the plaintiff an amount equal to the full proportion his stock bears to the whole amount due the depositor. *Jones vs. Wiltberger*... 575

4. Such stockholder cannot, after any one depositor has commenced suit against him on his liability, defeat said suit by paying other depositors than the plaintiff, even though he pay to the full amount of his liability. Such payment, after notice of suit, is in fraud of the plaintiff's claim, and contrary to the policy of the Act creating the liability, and if allowed would practically defeat the object of the Legislature in imposing the obligation. *Ibid.*

5. In such suits, the production of the original evidence of deposit, or the certificate of the assignee of the bank of the indebtedness, with the oath of the assignee that the stockholder has surrendered to him such evidences of deposit, with the receipts thereon, to the stockholder, of the owners thereof, is evidence to go to the jury to prove the payment of the same by the stockholder. *Ibid.*

LOCHRANE, C. J., dissenting:

6. When Wiltberger was a stockholder to the amount of one-tenth of the capital stock *in a savings company*, and the company was insolvent and in the hands of an assignee, and Jones brought his suit against Wiltberger upon the statutory liability imposed by the charter,

and upon the trial Jones showed he was a depositor and the amount due him, and Wiltberger showed that he extinguished his statutory liability by the surrender, for cancellation, to the bank, of debts due depositors to an amount greater than his proportionate liability:

Held, That Wiltberger was not bound to pay any specific sum of money, that he was bound only, to redeem his proportionate part of the debts due by the bank, and when he did this, it made no difference how he did it; when done he was discharged. *Ibid.*

7. *Held, again*, That a suit pending or instituted does not vest a legal right in the plaintiff to the recovery of the individual debt sued for; that the statutory liability to redeem is not an individual contract of suretyship with each depositor, and that the stockholder has the right, at any time before judgment, to redeem an amount of the debts equal to the obligation imposed on him by the charter, and such redemption will operate as an extinguishment of his statutory liability, and constitute a good defense to any *action* under the charter brought or to be brought, and Wiltberger would be liable for the costs in such case. *Ibid.*

See *Municipal Corporations.*

COSTS.

See *Dormant Judgments*, 1, 3.
" *Estoppel*, 1.

CO-TENANT. See *Ejectment*, 1.

CRIMINAL LAW.

1. An indictment, which alleged the offense to have been committed on the 13th day of August, 1868, and found by a grand jury, drawn according to the laws of this State which existed prior to the adoption of the Constitution of 1868, was a legal and valid indictment, though found subsequent to the date thereof. *Anderson vs. The State*..... 9

2. When the defendant filed a special plea of insanity, but did not insist that there should first be a trial on that special plea, but went to trial on the general issue

of not guilty, and relied on the insanity of the defendant to show that he was not guilty of the offense charged, it was not error for the Court to refuse to charge the jury that they might find a verdict either for or against the special plea of insanity, the Court charging the jury that they might find the defendant guilty, under the evidence, or not guilty. *Ibid.*

3. There was no error in the charge of the Court to the jury, "that they were the judges of the law and the facts, so as to enable them to apply the law to the facts, and bring in a general verdict, but they had no right to make law; the law was laid down in the Code; it was the province of the Court to construe the law and give it in charge, and of the jury to take the law as given, apply it to the facts as found by them, and bring in a general verdict;" and in refusing to charge as requested by defendant's counsel upon this point in the case. *Ibid.*

4. The Court did not err in charging the jury, "that if the condition of the defendant's mind was such that he could distinguish right from wrong, good from evil, and while in that condition, killed his wife, the law would hold him responsible," and in refusing to charge as requested. *Ibid.*

5. Under the 4599th section of the Code, it was the duty of the presiding Judge to have had the evidence in the case taken down, that is to say, all the legal evidence allowed to go to the jury; but as the record does not show any particular facts given in evidence, which the Court instructed the Clerk not to record, this Court cannot say whether the same were material or immaterial, legal or illegal, or whether the Court in its directions to the Clerk, expressed, in the presence of the jury, any opinion as to the evidence which was legally submitted to the jury for their consideration. To have made it error under the Code, it must be affirmatively shown that the Court expressed an opinion, in the presence and hearing of the jury, in regard to the evidence legally submitted to them on the trial. *Ibid.*

6. It is the right of the witness to have the testimony read over to him, but not the right of the defendant's counsel that it should be so read; the legal presump-

tion is that all the legal testimony in the case was correctly taken down under the direction of the Court. *Ibid.*

7. In view of the facts of this case, there was no error in the Court which could have influenced or controlled the verdict, in refusing to allow Dr. Terry to explain to the jury "the structure of the brain, what changes were produced upon it by bodily disease, or how its irritation and inflammation was calculated to present to the mind unreal images, upon which a person with a diseased brain might be induced to act, as though the imaginary impressions were real existences." *Ibid.*

8. The Court charged the jury that, "if, upon the whole evidence in the case, the jury entertain a reasonable doubt as to the sanity of the prisoner at the time of the commission of the alleged act, they are bound to acquit him:"

Held, That after a careful review of the evidence contained in the record, and the errors assigned therein, that the judgment of the Court below in refusing the motion for a new trial should be affirmed. *Ibid.*

9. A defendant was indicted for the offense of riot, and on being arraigned plead "not guilty," and was put upon his trial before the jury, and after the evidence was closed on both sides, the defendant withdrew his plea of "not guilty" and plead "guilty," which latter plea was entered on the minutes of the Court. After the jury were discharged from further consideration of the case, the defendant withdrew his plea of "guilty" and so notified the presiding Judge, in October, 1867. But the records of the Court do not show anything as to such withdrawal of the plea of guilty. No judgment was passed on the defendant at that time. In October, 1870, the defendant was called on to show cause why judgment should not be passed upon him for the offense, on his plea of guilty as it appeared on the records of the Court. The defendant showed for cause, the above recited facts, which did not appear on the records of the Court, and the Court passed judgment on the defendant in accordance with the facts as the same appeared on the records of the Court, to which the defendant excepted:

Held, That the proceedings of a Court are known by its records, and if the facts insisted on by the defendant for arresting the judgment did not appear on the records of the Court, the legal presumption is, that they did not exist, especially after the lapse of three years. *Garner vs. The State*..... 203

10. Where an indictment for burglary charged the parties with being accessories before the fact, and several witnesses were introduced who testified to the finding of the goods stolen in the possession of such parties, there being no evidence that they concealed the crime from the magistrate *and harbored*, etc., the principal; and the Judge charged the jury, "if they found from the testimony that the defendants procured a burglary to be done, and instigated the perpetration by reward or hope thereof, and afterward received the goods, knowing them to be stolen, it would authorize them in finding the defendants guilty as accessories after the fact," and in the same connection, "If they found from the evidence that the defendants concealed the crime or harbored the principal to prevent his arrest, then, in contemplation of law, they were accessories after the fact," and a motion was made in arrest of judgment and for a new trial which was overruled by the Court:

Held, The Court erred in its charge to the jury, and ought to have granted a new trial, under the facts in this case. *Loyd vs. The State*..... 221

11. On the trial of a prisoner who was indicted for the crime of murder in the county of DeKalb, where the crime was committed, after endeavoring to procure an impartial jury in the usual manner pointed out by law, the presiding Judge became satisfied that an impartial jury could not be obtained in that county, and passed the following order: "The State *vs.* Isaac Wheeler—The Court being satisfied that an impartial jury cannot be obtained in the county of DeKalb, for the trial of the above stated case, it is ordered by the Court that said case be transferred as to the defendants, from the county of DeKalb to the county of Fulton, and that the same be tried in said county of Fulton instead of the county of DeKalb, and that the Clerk of the Court in DeKalb make out, certify,

and transmit a complete transcript of the record in said case to the Clerk of Fulton Superior Court.

[Signed.] J. D. POPE, J. S. C."

This order of removal was objected to by the defendant, which objection was entered of record, but there is no error assigned in this Court as to that decision of the Court in DeKalb, as required by the 4191st section of the Code, so as to enable this Court to review it. There is another order in the record for the discharge of the jurors who had been sworn, in which it is recited, "that the Court having proceeded according to law to obtain a jury to try said case, and having, after using all necessary means, failed to obtain a jury, the jurors were discharged, and a new trial ordered, which was signed by the presiding Judge. On the trial of the case in Fulton county, the defendant moved to set aside the order removing the case, demurred and plead to the jurisdiction of the Court of that county, insisting upon his right to be tried in DeKalb county, in which the crime was committed, which motion, demurrer and plea were overruled by the Court.

Held, That, under the Constitution, the Superior Court of DeKalb county, in which the crime was committed, had the original jurisdiction for the trial of the defendant, except when the presiding Judge thereof is satisfied that an impartial jury could not be obtained in that county; and in that event, the Court had the power and authority, under the Constitution, the Act of 6th of October, 1868 and the 4593d section of the Code, with the consent of the Solicitor General and defendant, or his counsel, to select the county in which the defendant should be tried, and to order the case transferred accordingly. The Court *may* transfer the case to the county agreed on by the parties, or in the event they fail or refuse to agree upon any county, then the Court may transfer the case to the county agreed on by the parties, or in the event they fail or refuse to agree upon any county, then the Court may transfer the trial to such county as he may select. The record in this case does not show that there was any agreement as to the county, but the legal presumption in favor of the judgment is, that they failed or refused to agree upon any county.

Wheeler vs. *The State*..... 306

12. *Held further*, That the judgment of the Court in DeKalb county, removing the case to Fulton county, being the judgment of a Court of competent jurisdiction, could not be *collaterally* attacked in the Superior Court of Fulton county for irregularity, or as having been improperly granted, either on a motion to set it aside, or by demurrer or plea to the jurisdiction of the Court; and that the motion to set it aside, the demurrer and plea to the jurisdiction of the Court were properly overruled. *Ibid.*
13. *Held also*, That the challenge to the array of jurors impanneled to try the prisoner was properly overruled by the Court, inasmuch as it was not affirmatively shewn that the jurors were not selected from those whose names were in the jury-box, or that they had not been selected and summoned according to law. The legal presumption is, that the officers of the law performed their duty in the selecting and summoning the jurors, until the contrary is shewn by competent evidence; and the same may be said in regard to the objection made to the twenty-four traverse jurors. *Ibid.*
14. *Held again*, That there was no material error in the charge of the Court to the jury which could have influenced their verdict. And where the verdict is abundantly sustained by the evidence, as in this case, this Court will not be very *astute* in the discovery of errors, to set it aside, unless they be such as would have probably produced a different result. *Ibid.*
15. When a requisition is made by the Executive authority of this State for any person as a fugitive from justice, on the Executive authority of another State, and the Governor of this State appoints an agent to receive such fugitive to be transported to this State, it is the duty of such agent, without unreasonable delay, to bring said fugitive before the Governor of this State, (unless otherwise directed,) in order that said fugitive from justice may be turned over, under the order and direction of the Governor, to the proper civil authority of the county in which the offense was committed. If the defendant, as such agent, had such fugitive from justice in his custody, for the purpose of transporting him from the State of South Carolina to the Governer of this State, on his requisition,

as set forth in the record, without any unseasonable delay, then the defendant was not guilty of false imprisonment in the detention of said fugitive from justice for that purpose, and the Court below should have so instructed the jury. *Pettus vs. The State*..... ... 358

16. On a trial for murder, proof was given of the confessions of the prisoner, that the deceased had met him in the public road and attacked him suddenly and violently, by beating him with a stick; that he had remonstrated, and finally, holding the stick with one hand, he had, with the other, taken out his knife, and opening it with his teeth, he had stabbed the deceased twice, and deceased was shortly after found dead. But it was proven, in addition, that deceased was stabbed in four places; that the prisoner, on examination at the time, was without bruise or hurt, and that he was found in possession of the pistol, and the jury found a verdict of voluntary manslaughter, and the Court below refused a new trial:

Held, That this Court will not disturb the judgment of the Court below. *Banks vs. The State*..... 544

17. When, in a trial for murder, the defendant offered testimony in relation to the character of the house (being a house of ill-fame,) where the homicide was committed, which was rejected by the Court:

Held, That this was not error, as, under the facts, it was not relevant to the issue in the case. *Braswell vs. The State*..... 609

18. When the Judge refused to charged the jury: "If the deceased said the prisoner stole the lamp, and deceased called him a damned liar, and deceased rose up and put his hand in his pocket and advanced toward defendant, that such conduct was sufficient to excite the fears of a reasonable man:"

Held, That this was not error; for such question was one for the jury to find, upon all the proof in the case. *Ibid.*

19. When the Court gave the converse of this proposition in charge, reciting the facts, but not all the facts, which showed the intent, whether the act was done by malice, and concluded by telling the jury, if they found the facts recited to be true, the case was murder:

Held, That this was error in the Court, and not the proper manner of presenting the question to the jury for their adjudication, under the law of this State. *Ibid.*

20. When the facts of the case show clearly that the *act* of the killing was without any legal provocation, and, in fact, constituted the crime of murder, under the law:

Held, That this Court will not interfere to set aside the verdict for a charge of the Court, though expressed in language too strong against the accused, if, from all the evidence, this Court is satisfied with the verdict. *Ibid.*

CUMULATIVE REMEDY.

Where a suit was instituted against the Western and Atlantic Railroad for damages, growing out of a breach of contract, and the declaration alleged that the contract was in writing and had been lost:

Held, first, That the remedy, under the Code, section 3910, is cumulative, and does not deprive a party of his right to sue at law. *Wallace, Sup't, vs. Tumlin and Stegall* 462

DAMAGES.

1. In this case there being no appearance for the plaintiff in error, the defendant moved the Court to open the record, and prayed for an affirmance of the judgment of the Court below, with damages for delay:

Held, That the defendant was entitled to an affirmance of the judgment on the statement of facts contained in the record, and that damages be awarded as provided by the 4221st section of the Code for a delay in bringing the case up to this Court. *Avera vs. Vason*..... 233

2. The amount of damage in this case depended on the view the jury took from the evidence of the contract itself; and the finding of the jury in this case being sustained by the evidence as to the amount of damage, taking the value at the time they held the owner would have had his cotton sold, and allowing expenses, etc., will not be set aside—being supported by the evidence. *Gray, Bedell and Hughes vs. Bass.* 270

3. Where the evidence upon the breach of contract exhibits the fact that the plaintiff was to receive a certain price, and the amount necessary for the performance, after such alleged breach, is a matter of fixed computation, and the Court charged the jury, on the measure of damages, that plaintiff was entitled to recover the whole amount sued for, less what would have been his expenses in performing the contract:

Held, That the actual damages which the plaintiff was entitled to recover, embraces the difference between the cost of doing the work and the price to be paid for it. The law requires the utmost good faith in relation to contracts, and where parties refuse to carry out contracts into which they have entered, the party injured may pursue his remedy for damages, and the measure of the damages for such breach or refusal to carry out the contract will be computed by ascertaining the profits of the enterprise, after deducting the legitimate and actual costs of its execution; and, in the view we entertain of the law of this case, the charge of the Court below was error. *Wallace, Sup't, vs. Tumlin and Stegall* 462

See *Husband and Wife.*

DECREE. See *Equity Practice*, 3.

DEMAND.

Where, upon the contract entered into for cotton, the party had his election to require the return of the cotton at places specified, or payment in money therefor:

Held, That a demand for settlement and refusal to pay for the cotton, dispensed with any formal notice of election, and constituted sufficient demand and notice before the institution of suit to predicate the action. *The Newton Manufacturing Company vs. White*..... 148

DEMURRER.

Where the evidence of the plaintiff in the action, is insufficient, in law, to entitle him to recover, the defendant may demur thereto, and demand of the Court a judgment of non-suit; but if the demurrer to the evidence is overruled by the Court, then the defendant,

according to the long and well settled practice of the Courts of this State, may go before the jury and contest the plaintiff's right to recovery, by the introduction of evidence in his own favor. The overruling the defendant's demurrer to the plaintiff's evidence has never been held by the Courts of this State, since the adoption of the Judiciary Act of 1799, to be *conclusive* as to the plaintiff's right to recover the money or property sued for. *Levy vs. Simmons*..... 53

DILIGENCE.

See *Common-Carriers*, 1, 2, 4.
" *Continuance*, 6.
" *Evidence*, 3, 7.

DISTRESS-WARRANTS.

See *Landlord and Tenant.*
" *Priority of Liens.*

DISTRIBUTION OF ESTATES.

Where a bill was brought by the children of Jonas King, their deceased father, to recover from the executor of their grand-father, Jonathan King, their father's share being one-eight of the estate of said Jonathan, under the will, and the bill does not allege at what time Jonas King departed this life—whether before or after the death of the testator—and the bill was dismissed upon demurrer, for want of equity, etc:
Held, That the averment of the time of the death of Jonas King was material, and that it ought affirmatively to appear that he died before the testator, to sustain this proceeding by the heirs as against the executor for distribution of the estate, claiming, under his will; for if Jonas died after the death of the testator, the present parties would have no right to proceed by bill for settlement, etc., against the executor, and would require administration on Jonas King's estate, and suit by such administrator to enforce such settlement. *King vs. King*..... 512

DORMANCY.

See *Corporations*, 1, 2.

DORMANT JUDGMENTS.

1. The entry by the sheriff, of costs received from the plaintiff, was sufficient to keep the judgment from becoming dormant and the petition for the issuing of an *alias fi. fa.* and the proceedings therein had, was evidence of the intent of such plaintiff that his judgment was subsisting within the provision of law, and that the Court erred in holding the judgment to be dormant. *Thrasher vs. Foster*..... 212

2. Under the facts contained in this record, the judgment, or decree on which the execution issued, was not dormant. *Munroe et al. vs. Dumas*..... 238

3. A return by a sheriff upon a *fi. fa.*, that he has "received of the defendant $9 25, in full of the costs on this *fi. fa.*," is such a return or entry as, under section 2863 of the Revised Code, will prevent the dormancy of the judgment. *Clark vs. Feagan*..... 269

DOUBT. See *Criminal Law*, 8.

DOWER.

1. The widow's right to dower in the lands of which her husband died seized and possessed either by deed, or in law, is a legal right of which she cannot be barred except in the manner as provided by law; that is to say, her relinquishment of her right to dower must be made in the manner as prescribed by law. *Davis vs. McDonald*..... 205

2. Where a widow, with the assent of the administrator and the approval of the Ordinary, elected to take money in lieu of dower, and commissioners were appointed to assess the same, who made a return of their action, but the widow recalled her election and the Court passed an order setting aside the return, and permitting her to recall her election, and afterward commissioners were appointed in the ordinary way to assign to her dower, and they made a return of the assignment:

Held, That, in a traverse of the return by a creditor, the former proceedings, in relation to her choice of money in lieu of dower, were no bar to her present application; it appearing that she made her election

of money under the impression that the estate was fully solvent, when, in fact, its solvency is doubtful. *Dabney vs. Bailey*..... 521

EJECTMENT.

1. One tenant in common may bring ejectment against his co-tenant, if the possession of the co-tenant be adverse; if a recovery is had the plaintiff will be put in possession as tenant in common, leaving to the parties the right, by writ of partition or by bill in equity, to settle any equities there may be between them as tenants in common. (See concurrence of WARNER, J.) *Logan vs. Goodall*..... 95

2. Where, in an action of ejectment for land, the controversy is about the dividing line, and the plaintiff shows title in himself to the lot, but not a chain of title from the State, and the defendant claims through a deed from plaintiff, and evidence is introduced to prove the acquiesence of the defendant in the boundary asserted by plaintiff, and such witness discloses by his evidence the existence of such deed, and a motion made to rule out the evidence relative to the contents of the deed was overruled and the plaintiff closed his case, and the jury found for the plaintiff with *mesne* profits:

Held, That the plaintiff had not shown such title as would allow him to recover on the deeds, his evidence being no chain of title from the State to him. *Anderson vs. Suggs*..... 265

3. *Held further*, That while evidence of acquiesence in the boundary under the facts, in this case was competent evidence, it was not competent to go into the contents of the deed, and on the fact of the existence of such deed from plaintiff to defendant being shown, it was the duty of the Court to stop the testimony until the parties, one or the other claiming under such deed, produced it. And as a question of practice, he who claims any right or benefit arising under any instrument in writing is the party whose duty it is to present it to the Court and put it in evidence. *Ib.*

4. The value of the premises in dispute, in an action of ejectment, except so far as it effects the *mesne* profits, is immaterial to the issue. *Merrill vs. Whitaker et al.* 403

5. The execution of a deed to which an affidavit has been filed, under section 2670 of the Revised Code, cannot be proven by acknowledgements of the supposed maker of the deed that the land described was the property of the supposed grantee. *Mills vs. May.* 623

6. When on the trial of an action of ejectment the evidence turned on the question of title, and the verdict was for the defendant, and the plaintiff moved for a new trial on the ground of newly discovered testimony by which it could be shown that the defendant, whilst in possession of the land, had admitted that the same was the property of the plaintiff, he being the tenant, or in possession, as the agent of the plaintiff:

Held, That this did not come within the rule of excluding cumulative testimony, as it went to a new and distinct right to recover, and a new trial ought to have been granted. *Ibid.*

See *Amendment*, 2.

ELECTION. See *Demand.* See *Dower*, 2.

EMANCIPATION OF SLAVES.

When, in 1858, Nathan Truitt died, leaving a will in which he bequeathed to B certain negroes, (described as old and faithful slaves,) and certain other property in trust, directing that B should permit them, as long as any of them wish, to cultivate, for their support, a certain parcel of land, and see to it that they were well treated, and provided that, at B.'s death, before the death of all the negroes, the trust should pass to C, and after the probate of the will, no action was taken by B in the matter, and the negroes and other property passed in the usual course of administration to the residuary legatee, and since the emancipation of the slaves, B filed a bill to set up the trust:

Held, That the bill was properly dismissed by the Chancellor for want of equity. *Ellis vs. Rachels*..... 175

EQUITY.

1. A bill by creditors charging that the debtor, who is insolvent, has fraudulently transferred his property, a stock of dry goods, to a third person who is in

complicity with the fraud, and who is rapidly selling them at retail to other persons, and praying the appointment of a Receiver, is not demurrable, on the ground that the complainants do not show that they have sued their claims to judgment at law. *Cohen vs. Myers, Cohen & Company*..... 46

2. If the complainant is entitled to any relief under the statement of facts contained in the record, he has as ample and adequate remedy in a Court of law as in a Court of equity, and there was no error in the Court below in sustaining the demurrer to the complainant's bill, and dismissing the same for want of equity. *Seago vs. Harrison et al*..... 189

3. Where there was a bill pending in equity in favor of Zorn *vs.* Respass, in relation to the title and possession of land, and during Respass' temporary absence from the county, Zorn dismissed his bill and took out a proceeding as an intruder against Respass' tenant, an ignorant colored man, who had a growing crop on the premises, and who, from ignorance of his rights, failed to make the counter-affidavit required by law, and Zorn, was in consequence, put in possession, and Respass ousted, and Respass immediately on his return, made the affidavit, but the sheriff refused to receive or act upon it:

Held, That a bill setting up these facts, and praying a restitution of the possession as unfairly obtained under color of legal process, is not demurrable for want of equity, or because there is an adequate remedy at law. *Respass vs. Zorn*..... 389

4. Where a bill in equity was brought by a ward, through her guardian, against an administrator, charging that, by a previous litigation against such administrator, she had obtained a decree, by which she was decreed a specific interest in certain property, being an undivided interest therein to the value of $2,850 00, and the jury further decreed, that "this decree shall operate as a conveyance to her of said undivided interest in said lands and premises," and the bill avers that the property is being wasted and mismanaged, and that the sale of the whole is necessary to a proper division or partition, and that the administrator and his securities on his bond are involved, and that the

administrator refuses to comply with the decree in the premises and sets up new defenses; that the property belongs, in part, to other heirs, and that they were not parties to the original bill, and not bound thereby; and the bill prays for the appointment of a Receiver and a sale of the property, for the purpose of division, and the Court, upon the hearing, dismissed the bill for want of equity, on the ground, that the questions raised were previously adjudicated:

Held, That the Court erred; that the facts alleged constituted strong ground for the interposition of equity, and that it was the duty of the Court to have retained the bill and appointed a Receiver, and by proper process to have caused all the parties in interest to be made parties to the bill, and to have adjudicated and settled the respective rights of the claimants, if found that they were not bound by the decree in the original bill, and to have the property sold for the purposes of division. And we remand this case to the Chancellor, with these instructions. *Ware vs. Ware* 488

5. Where a suit was pending against two joint and several obligors, one of whom claimed to be security only for the other, and this was known to the plaintiff, and the principal had filed a plea to the merits of the action, and the plaintiff, without the action or consent of the surety, and after the surety, satisfied that no trial could be had on the plea at that term of the Court, had gone home, dismissed his suit as to the principal, to get clear of the plea, and then took a judgment against the surety, and the surety filed a bill to enjoin the judgment, alleging these facts, and alleging, further, that at the time the suit was dismissed against the principal, the debt was barred by the Statute of Limitations, and if the surety paid the debt, he was, by this act of the plaintiff, deprived of his rights to recover it from the principal:

Held, That there was equity in the bill, and the Judge, on the facts of the case, as they appeared on the bill, answer and affidavits, ought to have granted the injunction until the trial could be had on the case made by the bill. *Turner vs. McCarter*..... 491

6. Where there was a bill filed to reform a voluntary deed, on the ground of mistake, and the dispute was between those claiming under the deed, the grantor

being indifferent, the rule in equity that a deed will not be reformed at the instance of mere volunteers, does not apply. *Adair vs. McDonald et al*..... 506

7. Under the laws of this State, Revised Code, sections 3067 and 3068, a mistake of law, as when an instrument has a different legal effect from what the parties to it intended, may be relieved against in equity, or if the mistake be in but one of the parties, if that one place great trust and confidence in the other, and that confidence be betrayed, equity will relieve against the mistake. *Ibid.*

8. Where there was a suit pending in a Justice's Court, and the defendant moved to continue, on account of the absence of a witness, the payee of the note, by whom he could prove that the note was given in liquidation of a debt due to the payee, for medical services rendered by him to the defendant's ward, and that it was not the intent of the parties, in giving or the taking of the note, to bind the defendant, personally, for the debt:

Held, That there was nothing in this evidence, as stated, to show such a mistake, either of law or fact, as to authorize a reformation of the note, and the continuance was properly overruled, *Pool vs. Wilkinson*.... 539

9. When A, as administratrix, filed her bill against B, administrator, to enjoin suits in ejectment and for the purchase of land, upon the following statement of facts: A and B, in their lifetime, bought together a certain ferry and lands, A taking title to himself, and afterwards made title to one-half to B, and B made payments, and gave his note for balance of the parchase-money, and B also turned over to A the whole proceeds of the ferry, and other accounts alleged to have been paid, and which, together, amounted to the balance due, and the Court overruled the demurrer to the bill and granted the injunction prayed:

Held, That the judgment of the Court was not error, in this, that jurisdiction for purposes of injunction existed in the county when the suits were pending, and the facts alleged made a proper case for equity interference. *Byrd vs. Lewis*..... 626

EQUITY PLEADING.

An injunction to restrain the enforcement of a judgment at law on the ground that there is a good defense to a part of the claim on which the judgment is founded, but said defense did not come to the knowledge of the defendant, until it was too late to set it up at law, ought not to be granted, unless the complainant tender in the bill the amount he admits to be due, and unless the bill clearly show by distinct and positive averments what the defense is, how and by whom it can be proven, and that the failure to acquire the knowledge of it before the trial at law, was wholly unmixed with any negligence on the part of the complainant, or any want of attention to the means of information within the reach of a man of ordinary prudence and discretion. *Hill* vs. *Harris*..... 413

EQUITY PRACTICE.

1. In a motion to revoke an order appointing a Receiver, on the ground that the answer of the defendants, with the supplemental affidavits, "swears off" the equity of the bill, the Chancellor is authorized by law to grant or refuse the motion, according to his discretion, under all the facts and circumstances of the case, and this Court will not control his judgment unless his decision has been abused. *Cohen* vs. *Myers, Cohen & Company*..... 46

2. Inasmuch as the answer of the defendant was not filed under the order or process of the Court requiring the defendant to answer complainant's bill, but was voluntarily filed by him by way of showing cause against granting the injunction, it was to be considered by the Judge for what it was worth, in the shape in which he voluntarily chose to present it, and the complainants did not have the legal right to complain of his action in regard to that matter; nor did the Judge err in refusing to allow the complainants to examine the defendant *orally* as a witness, on a motion to grant an injunction. *Cubbedge & Hazlehurst* vs. *Adams*..... 124

3. Where a decree was not signed by the Chancellor:
Held, That the jurisdiction for the trial of equity causes in this State was vested in the Superior Court, in which this judgment or decree was rendered, and

that this was a judgment or decree of *that Court;* and having been rendered prior to the adoption of the Code, under the general rule of practice that prevailed in most of the Courts of the State at that time, it ought not now to be set aside on the ground that it was not signed by the Chancellor, even if, under the Constitution and laws of this State vesting the jurisdiction and regulating the trials of equity causes, the decree rendered on the verdict of a jury is now required to be signed by the Chancellor, in order to constitute it a valid decree. The Code is certainly directory in regard to that matter, and should be followed in all cases tried since its adoption, but when it is signed as required by the Code, is it the judgment or decree of *the Chancellor*, or is it the judgment or decree of *the Superior Court? Munroe et al., vs. Dumas*..... 238

4. A bill praying for an injunction was presented to the Judge for his sanction, and a rule *nisi* was granted, calling upon the defendants to show cause, on the day therein named, why the injunction should not be granted, which was duly served on the defendants, but they failed to appear and show cause on the day named by the Judge, and afterward the Judge granted the injunction. Whereupon the defendants, by their counsel, petitioned the Judge to suspend his order granting the injunction, which was refused, and the defendants excepted.

Held, That there was no error in the refusal of the Judge to grant the petition to suspend his order granting the injunction, on the statement of facts contained in the record; that their remedy was to move a dissolution of the injunction in manner prescribed by law in such cases, if they desired to get rid of it. *Clark vs. Herring & Mock*..... 240

5. It is error in the Judge of the Superior Court to dismiss a bill in vacation, except upon demurrer by the defendant. *Gullatt vs. Thrasher*..... 429

ESTOPPEL.

1. *Held*, That it was the right of the plaintiff to have had all the legal costs due in the case, including the costs of plaintiff's witnesses, taxed by the Clerk, and inserted in the blank left in the judgment for that

purpose, and to have proceeded to collect the principal, interest and cost, by due process of law, but, inasmuch as the plaintiff agreed to settle the judgment on the terms proposed by the defendant, with a full knowledge of all the facts, and gave a receipt in full of the within judgment, there was no error in the refusal of the Court to allow the motion to enter a judgment *nunc pro tunc* against the defendant for the costs due the plaintiff's witnesses. *Calhoun vs. The Mayor and Council of Atlanta*..... 187

2. A bill was filed for direction and to marshal the assets of a deceased intestate's estate, and the question as to priority of payment was made between a mortgage creditor of the intestate and the legatees of a testator, on the following statement of facts: Dickson, Davis and Mary Cheeley were the executors and executrix of John Cheeley, deceased; in December, 1860, the executors sold at public outcry a tract of land as the property of their testator, the terms of the sale being a credit of twelve months, with notes and approved security; the land of said executors' sale was bid off by Dickson, one of the executors, for the sum of $9,041 00, who gave his individual note to Davis, one of the executors, for the amount, and went into immediate possession of the land, and remained in possession of it up to the time of his death, controlling and using it as his own property. Dickson gave no security on the note, and refused to give any. The land was worth, at the time of the sale, in the market, what Dickson bid for it. Afterwards, Mrs. Cheeley, one of the executors, (Davis being dead,) instituted a suit in equity against Dickson on the note given by him for the land, and claimed a vendor's lien for the purchase-money due therefor by Dickson, obtained judgment for what was then due on the note, and established the vendor's lien on the land for unpaid purchase-money due therefor by Dickson. After Dickson's death the land was sold, under that judgment establishing the vendor's lien, and the proceeds of that sale were paid over to the legatees of John Cheeley. The land was sold under that judgment for what it was worth in the market at the time, but lacked paying off the judgment the sum of $2,484 00. The Court decided that this latter sum was a debt

due by Dickson, as *executor* of John Cheeley, and entitled to priority of payment out of his assets:
Held, That the purchase of the land by Dickson, at executor's sale, was not void but voidable, at the election of the legatees; that they might have treated that sale as a *devastavit*, on the part of the executor, or ratify it, at their option, but having acquiesced in that purchase for a considerable length of time, and treated the debt due by him therefor as his *individual* debt, and having received the larger portion of the judgment in payment for their claim for the land founded on that individual debt due by him for the land, they cannot now be heard to say that the balance due on the judgment is a debt due by him as executor, after receiving the larger amount of the judgment obtained against him for the land as a debt due by him in his individual capacity; they could either have repudiated the sale of the land at the executor's sale, and treated it as a *devastavit*, or ratified and confirmed it, but they cannot ratify the sale of the land in part, and repudiate it in part; in other words, they cannot reserve a part of the money for the land as due by Dickson in his individual capacity, and as his individual debt as a purchaser of the land at the executor's sale, and claim that the balance of that same debt is due by him as executor for a *devastavit* in purchasing the land at his own sale, as set forth in the record. If the land had sold for more money under the judgment sale as the individual property of Dickson than he paid for it at the executor's sale, then the legatees would have had the benefit of it, but as the land sold for less, they cannot, now, after the land has been sold in the due course of administration, under the vendor's lien, asserted by the surviving executor, who represented the interest of the legatees of Cheeley's estate; and with a full knowledge of the facts on their part, having acquiesced in the same, and received the proceeds of the land, they must now be held to have affirmed the purchase of Dickson at the executor's sale, and that his debt for the land was his individual debt, and not a debt due by him as an executor for a *devastavit* in purchasing the land at his own sale. *Brantley vs. Cheeley*... 209

See *Dower*, 2.
" *Appeals*, 1.

EVIDENCE.

1. While evidence of acquiescence in the boundary under the facts, in this case was competent evidence, it was not competent to go into the contents of the deed, and on the fact of the existence of such deed from plaintiff to defendant being shown, it was the duty of the Court to stop the testimony until the parties, one or the other claiming under such deed, produced it. And, as a question of practice, he who claims any right or benefit arising under any instrument in writing is the party whose duty it is to present it to the Court and put it in evidence. *Anderson vs. Suggs*..... 265

2. Where, in an action brought under the provisions of section 2988 of the Code, for stock killed, the notice required was served personally by the plaintiff, who attached his affidavit of such service thereto:

Held, That such affidavit was sufficient evidence of such service, and not being traversed, it was not necessary to have produced the witness on the stand to prove the same. *The Macon & Western Railroad Company vs. Baber*..... 300

3. Where proof of a loss of an original paper is made before the Court, and he admits secondary proof thereof:

Held, Under sections 3714 and 3779 of the Code, questions of diligence in exhausting the means of information for primary evidence, accessible to the party, is one addressed to the sound discretion of the Court below, with which this Court will not interfere, except where it has been flagrantly abused. *Wallace, Superintendent, etc., vs. Tumlin vs. Stegall*..... 462

4. The Court charged the jury as follows: "It is a rule that a witness swearing positively to a fact, is to be believed in preference to many who swear negatively to the same fact, that is, that they did not see or hear it. If the existence of a fact be sworn to by one credible witness, and many other witnesses who were in a situation to see or hear it, testify that they did not see or hear it, or know that it transpired, you are bound to regard the testimony given by the witness who swears postively, in preference to those who swear negatively."

Held, While the general rule is, that other things being equal, positive evidence preponderates over negative evidence, the charge of the Court was error, under the facts of this case, in stating the rule too strongly, that the jury were bound to regard the testimony of the positive witness in preference to those who testified, for circumstances may out-weigh positive testimony. *Innis vs. The State*..... 473

5. In cases of rape, the question of guilt or innocence should not be measured abitrarily by the character of the proof, whether positive or negative, direct or circumstantial, but by the weight of the proof; all the facts should be submitted to the jury under the charge of the Court, stating the law in regard to what was necessary to establish the accusation, and the jury should be left to consider the whole evidence to ascertain the guilt or innocence of the prisoner. *Ibid.*

6. The bill for the corn, accompanying the shipment thereof, was properly admitted in evidence on the trial. *Ketchum vs. Verdell*..... 534

7. If a paper has been diligently searched for and cannot be found, its contents may be shown by parol. (R.) *Godfrey et al. vs. Walker et al*..... 562

8. If the printed minutes of a Conference were read to a party by one who knew they were the minutes, it is competent to read said minutes in evidence to show what was read to the party. (R.) *Ibid.*

9. When on the trial the Court permitted the proof of loss to go to the jury as evidence of the ownership:

Held, Such use of this testimony was not authorized; that the rule is, the proof of loss by claimant under his policy, may go to the jury to show his compliance with the terms of the policy, but is not evidence of ownership, loss, or value, but such must be established by proof under the rules of evidence. But as in this case the evidence is complete and uncontroverted upon the point, we do not regard it sufficient to set aside the judgment. *The Southern Insurance and Trust Company vs. Lewis and Brothers*..... 587

10. The execution of a deed to which an affidavit has been filed, under section 2670 of the Revised Code, cannot be proven by acknowledgments of the sup-

posed maker of the deed that the land described was the property of the supposed grantee. *Mills vs. May.* 623

11. When on the trial of an action of ejectment the evidence turned on the question of title, and the verdict was for the defendant, and the plaintiff moved for a new trial on the ground of newly discovered testimony by which it could be shown that the defendant, whilst in possession of the land, had admitted that the same was the property of the plaintiff, he being the tenant, or in possession, as the agent of the plaintiff:

Held, That this did not come within the rule of excluding cumulative testimony, as it went to a new and distinct right to recover, and a new trial ought to have been granted. *Ibid.*

See *Criminal Law*, 9.

EXPOST FACTO. See *Criminal Law*, 1.

FALSE IMPRISONMENT.

See *Criminal Law*, 15.

FRAUDULENT SALES. See *Equity*, 1.

FRAUDULENT USE OF PROCESS.

See *Equity*, 3.

FUGITIVES FROM JUSTICE.

See *Criminal Law*, 15.

GIFTS.

1. Where there was a question of fact, as to whether there had been a formal gift, by the father to the son, of real estate, with delivery of possession, under such circumstances as made the gift good against creditors of the father, and there was evidence on both sides, and the whole question of law and fact was submitted to the Judge, this Court will not disturb his judgment unless it be strongly and decidedly against the evidence. (By two Judges.) *Mims vs. Ross et al...* 12

2. To make a valid gift there must be a present intention to give, and a complete renunciation of right, by the giver, over the thing given, without power of re-

vocation, and a full delivery of possession as a gift, *inter vivos.* (R.) *Ibid.*

3. The legatee of a specific bequest of real estate, under a will, who has the assent of the executor to the legacy, has not such a title as gives him a right to take a homestead therein, to the exclusion of the creditors of the tesator. *Ibid.*

GUARDIANS.

See *Trustees and Trust Estates*, 5.

HOMESTEAD.

1. The legatee of a specific bequest of real estate, under a will, who has the assent of the executor to the legacy, has not such a title as gives him a right to take a homestead therein, to the exclusion of the creditors of the testator. *Mims vs. Ross et al*..... 121

2. Where a party applies, under the Act of 1868, for homestead, and the facts show that he is a bachelor, having no person depending on him for support and maintenance which the law imposes on him as a legal duty, and the Court below affirms the judgment of the Ordinary holding that such single person was not the head of a family and not entitled to a homestead:

Held, That there was no error in the judgment, but that it was in consonance with the judicial interpretation of the Constitution by this Court in the premises. *Calhoun vs. McLendon*..... 405

3. The Act of 1870, declaring a single person to be the head of a family, is not a judicial construction of the Constitution; that the judiciary, under our government, is alone empowered to interpret the Constitution and laws; and, with great deference to the legislative department of the State government, we hold that it is not competent to enact that a single person living to himself or herself is the head of a family within the meaning of Article VIII., section 1, of the Constitution, but the decision of this Court on that subject is paramount. *Ibid.*

4. Under the Constitution of 1868 and the Acts passed to carry the homestead clause therein into effect,

posed maker of the deed that the land described was the property of the supposed grantee. *Mills vs. May.* 623

11. When on the trial of an action of ejectment the evidence turned on the question of title, and the verdict was for the defendant, and the plaintiff moved for a new trial on the ground of newly discovered testimony by which it could be shown that the defendant, whilst in possession of the land, had admitted that the same was the property of the plaintiff, he being the tenant, or in possession, as the agent of the plaintiff:

Held, That this did not come within the rule of excluding cumulative testimony, as it went to a new and distinct right to recover, and a new trial ought to have been granted. *Ibid.*

See *Criminal Law*, 9.

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GIFTS.

1. Where there was a question of fact, as to whether there had been a formal gift, by the father to the son, of real estate, with delivery of possession, under such circumstances as made the gift good against creditors of the father, and there was evidence on both sides, and the whole question of law and fact was submitted to the Judge, this Court will not disturb his judgment unless it be strongly and decidedly against the evidence. (By two Judges.) *Mims vs. Ross et al*... 12

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2. Where a party applies, under the Act of 1868, for homestead, and the facts show that he is a bachelor, having no person depending on him for support and maintenance which the law imposes on him as a legal duty, and the Court below affirms the judgment of the Ordinary holding that such single person was not the head of a family and not entitled to a homestead:

Held, That there was no error in the judgment, but that it was in consonance with the judicial interpretation of the Constitution by this Court in the premises. *Calhoun vs. McLendon*..... 405

3. The Act of 1870, declaring a single person to be the head of a family, is not a judicial construction of the Constitution; that the judiciary, under our government, is alone empowered to interpret the Constitution and laws; and, with great deference to the legislative department of the State government, we hold that it is not competent to enact that a single person living to himself or herself is the head of a family within the meaning of Article VIII., section 1, of the Constitution, but the decision of this Court on that subject is paramount. *Ibid.*

4. Under the Constitution of 1868 and the Acts passed to carry the homestead clause therein into effect,

neither the widow nor minor heirs of a deceased person have any right of homestead in the property of the deceased, as against the claims of the adult heirs to their distributive share under the statute of distributions. *Kemp vs. Kemp, Griffin vs. Griffin*..... 523

HOMICIDE. See *Criminal Law.*

HUSBAND AND WIFE.

By the common law, the husband could not maintain an action to recover damages for the homicide of his wife, and, by the provisions of the Code of this State, authorizing damages to be recovered for *physical* injuries done by one person to another, the right to recover damages for a homicide is limited to a widow for the homicide of her husband, or if there is no widow, then the child or children may recover damages for the homicide of the husband or parent; but the Code does not give the right to the husband to recover damages for the homicide of his wife. If the Legislature had intended to have changed the common law rule on this question, it would have done so when declaring the particular class of persons who were entitled to recover damages for homicide, in the 2920th section of the Code. The Court below, therefore, erred in overruling the second ground of demurrer to the plaintiff's declaration. *The Georgia Railroad and Banking Company vs. Wynn*..... 331

INDICTMENT. See *Criminal Law*, 1.

INJUNCTION.

1. As a general rule, a Court of equity will not interfere at the instance of a general creditor, before judgment, to set aside a voluntary conveyance alleged to have been made for the purpose of defrauding creditors, and restrain by injunction the sale of property held by the debtor under that voluntary conveyance as trustee or in his own right, on the ground of fraud, when the fraud alleged is the *execution of such voluntary conveyance without notice to the creditors Cubbedge & Hazlehurst vs. Adams*..... 124
2. The original jurisdiction to grant, or refuse to grant, or to continue, or refuse to continue an injunction in

an equity cause, is vested by the Constitution and the laws of this State in the Superior Courts or in the several Judges thereof, as regulated by law, who may, in the performance of that duty so devolved on them exercise a sound discretion as to the granting or refusing an injunction, according to the circumstances of each case presented for their consideration. *Ibid.*

3. This Court has no original jurisdiction to grant or to refuse an injunction, but is alone a Court for the *correction of errors* from the Superior Courts and City Courts; and unless it is manifestly apparent, from the record, that the Judge of the Superior Court has abused the discretion vested in him by law, either in granting or refusing to grant an injunction, there is no error which this Court can correct; and, according to the facts as presented by the record in this case, there was not such an abuse of that discretion which the law has vested in the Judge of the Court below, in refusing to grant the injunction prayed for, as will authorize this Court to control it. *Ibid.*

4. Inasmuch as the answer of the defendant was not filed under the order or process of the Court requiring the defendant to answer complainant's bill, but was voluntarily filed by him by way of showing cause against granting the injunction, it was to be considered by the Judge for what it was worth, in the shape in which he voluntarily chose to present it, and the complainants did not have the legal right to complain of his action in regard to that matter; nor did the Judge err in refusing to allow the complainants to examine the defendant *orally* as a witness, on a motion to grant an injunction. *Ibid.*

5. A mere general creditor who has not reduced his claim to a judgment, and who has no lien upon the property of his debtor, has no right to come into equity to enjoin a mortgage given by the debtor to another creditor, on the ground that the mortgage is upon property to which the debtor did not acquire title until after the date of the mortgage. *Peyton vs. Lamar.* 131

6. A Court of equity will entertain a bill, for the purpose of setting off a debt due on a dormant judgment, when a *scire facias* is pending to revive it, against a judgment which is not dormant, when the plaintiff in

the latter judgment, and defendant in the former judgment is *insolvent*, and will enjoin the collection of the judgment which is not dormant until the dormant judgment shall be revived, unless some good legal reason be shown why the dormant judgment cannot be revived. *Camp vs. Pace*..... 161

7. There was no error in the Court below in overruling the demurrer to the complainant's bill, and this Court will not control the discretion of the Court below on the statement of the facts contained in the record, in retaining the injunction until the trial can be had thereon. *Ibid.*

8. The Ordinary of Glynn county had no authority, without the consent of two-thirds of the grand jury, to levy the extraordinary tax of one hundred and fifty per cent., under the Act of 1869, and the Court below erred in not granting the injunction restraining the collection of the same. *Couper et al. vs. Rowe*.... 229

9. A bill praying for an injunction was presented to the Judge for his sanction, and a rule *nisi* was granted, calling upon defendants to show cause, on the day therein named, why the injunction should not be granted, which was duly served on the defendants, but they failed to appear and show cause on the day named by the Judge, and afterwards the Judge granted the injunction. Whereupon the defendants, by their counsel, petitioned the Judge to suspend his order granting the injunction, which was refused, and the defendants excepted:

Held, That there was no error in the refusal of the Judge to grant the petition to supend his order granting the injunction, on the statement of facts contained in the record; that their remedy was to move a dissolution of the injunction in manner prescribed by law in such cases, if they desired to get rid of it. *Clark et al. vs. Mock*..... 240

10. It is only when the Judge below abuses his discretion, *i. e.* commits an error in law, that this Court will interfere with his granting or refusing an injunction. (R.) *Moses vs. Flewellen*..... 386

11. Where the equity of the bill is denied by the answer and accompanying affidavits, this Court will not

disturb the judgment of the Court below dissolving ing the injunction. *Gullatt vs. Thrasher et al*..... 429

12. Pending a controversy, under a *quo warranto*, against one in possession of a public office, a Court of equity has no jurisdiction to enjoin the *de facto* officer from receiving the fees of the office, nor to appoint a Receiver to take and hold the same until the controversy is settled. *Stone vs. Wetmore*..... 601

13. It is only when the Judge of the Superior Court has committed some error of law, or has abused his discretion in judging of the facts, that this Court will interfere with his judgment in refusing or granting a temporary injunction. *Bonaud vs. Genesi*..... 639

INSANITY. See *Criminal Law*, 2, 4, 7.

INSURANCE.

1. Under section 2770 of the Revised Code of this State, "a second insurance on the same property, without the consent of the insurer, voids his policy." And this is true, even though the second insurance, valid upon its face, is voidable by the second company, on the ground of the failure of the insured to give it notice, at the time the policy was procured, of a prior insurance of the same property in another company. *Lackey vs. The Georgia Home Insurance Company*... 456

2. A brought his action upon a policy of insurance, and it appeared on the trial that he had erected the storehouse insured upon the land of B, under a parol contract that he was to have the title, and in consideration thereof was to erect an adjacent store for B. A went into possession under the contract, and erected his store and was building a store adjoining for B, in pursuance of his contract:

Held, That A had an insurable interest in the property, under section 2953 of the Revised Code, and that the recital in the policy of A's ownership of the storehouse insured was not a misrepresentation, under the facts in this case, and that the recital of *ownership* in a policy of insurance is not such a technical expression as amounts to warranty, under our law. *The Southern Insurance and Trust Company vs. Lewis & Brothers*... 587

3. Where A insures property with B, who is the agent

of the company, and pays B an additional per cent. on the premium on account of carpenter's work being carried on in the completion of adjoining building, and such fact is not expressed in the face of the policy:

Held, That this did not avoid the policy. When a building is insured and an adjoining one has some hazardous business carried on therein, though such fact increases the risk, it is not necessary to express it in the face of the policy, when it is known to the agent. *Ibid.*

4. Where A insures property, and, in the policy, carpenter's trade being carried on within the building, is denominated hazardous, and the proof is that no carpenter's work was done within the building insured, but was being carried on, not as a trade, but for the purpose of erecting another building:

Held, Under the facts, that this did not violate the conditions of the policy and render it void. *Ibid.*

5. When on the trial the Court permitted the proof of loss to go to the jury as evidence of the ownership:

Held, Such use of this testimony was not authorized; that the rule is, the proof of loss by claimant under his policy, may go to the jury to show his compliance with the terms of the policy, but is not evidence of ownership, loss, or value, but such must be established by proof under the rules of evidence. But as in this case the evidence is complete and uncontroverted upon the point, we do not regard it sufficient to set aside the judgment. *Ibid.*

6. When the Judge charged the jury, in his opinion A had an insurable interest:

Held, That this was an improper mode of presenting the case. He ought to have called the attention of the jury to the facts, and then stated: "If you believe, etc., then, in the opinion of the Court, under the law, you will find that he had an insurable interest." But under the facts in this case, we regard the statement rather as a legal conclusion, than an opinion on the facts; and as the case was clearly made out, we do not think it sufficient ground to reverse the judgment. *Ibid.*

JOINDER OF ACTIONS.

1. A rule against a sheriff for money, and an attachment for not paying over that money, all occurring at the same term, are the same cause and may be joined in one bill of exceptions. (R. See end of Report.) *Martin vs. Huson*..... 83

2. A count on an implied contract may be joined with one on a special contract, and that, too, by amendment. *Gray, Bedell and Hughes vs. Bass*..... 270

JOINT OBLIGORS. See *Equity*, 5.

JUDGMENTS.

There was no error in the refusal of the Court to allow the judgment to be opened so as to enable the defendant, Wright, to file his plea to the original suit, on the statement of facts contained in the record. *Wright vs. McBride*..... 234

See *Lien of Judgments.*

JURISDICTION OF SUPREME COURT.

A bill was filed against two. The answer of one defendant contained a cross-bill against the other. The bill was dismissed for want of equity. The cross-bill was amended and an order was taken that the other defendant be served with a copy, and that the cause, as between these defendants, stand for trial at the next term. The defendant in this cross-bill brought up the cause: *Held*, That he was premature. (R.) *Ransom & Co. vs. Coleman*..... 39

JURY.

See *Criminal Law*, 3.
" *New Trials*, 3.

KING'S ENEMIES.

See *Common-Carriers*, 3.

LANDLORD AND TENANT.

1. An affidavit was made before a Judge of the Superior Court, on the 15th of November, 1869, to obtain a distress-warrant for rent not due, alleging that Hill,

the tenant, was justly indebted to Beall, the landlord, the sum of $220 00 for the rent of thirty acres of land, that the rent note was not due until the 15th day of December, 1869, but that Hill, the tenant, is removing, and has removed, a large portion of his crop from the land, the said note being unpaid. Hill, the tenant, filed a counter-affidavit, in which he simply alleged that the sum distrained for rent was not due, without negativing the fact that he was removing the crop made on the land. On the trial of the case the plaintiff's counsel demurred to the defendant's affidavit as being insufficient in law, and moved the Court to dismiss the same, which motion the Court overruled. Afterwards, on motion of defendant's counsel, the Court dismissed the plaintiff's affidavit, on the ground that a Judge of the Superior Court was not authorized by law to issue a distress-warrant:

Held, That the Court erred in not sustaining the plaintiff's demurrer to the defendant's affidavit and dismissing the same, as it did not deny the fact alleged in the plaintiff's affidavit, that he was removing the crop from the land, which was the sole ground for taking out the distress-warrant against him by plaintiff under the 2259th section of the Code. If the question as to the authority of the Judge of the Superior Court to issue a distress-warrant was now an original question before this Court, we should be inclined to hold that he did have such authority under the general powers conferred upon that officer by the Constitution and laws of the State; but the decisions of this Court in *Holland vs. Brown*, 15th Georgia Reports, 113, and *Keaton vs. McDonald*, 24th Georgia Reports, 166, limit the authority to issue such warrants to a Justice of the Peace; the fourth section of the Act of 1856–66 applies only to the question of tenants holding over, and not to the question of issuing distress-warrants for rent. *Beall vs. Hill.* 172

2. The distress-warrant issued by the Judge of the Superior Court was properly dismissed by the Court below. *Ibid.*

3. A tenant rented a hotel for one year, agreeing to pay sixty dollars per month rent therefor, payable monthly in advance, and after occupying the premises about five months the landlord took out a warrant for the

removal of the tenant from the premises for the non-payment of rent due, under the provisions of the 4005th section of the Code; whereupon the tenant filed his bill on the equity side of the Court, alleging that the rented premises were not tenantable, and in consequence of the failure of the landlord to keep the rented premises in a tenantable condition, that he had been damaged in the sum of thirteen hundred dollars; that the landlord was insolvent, and that the tenant was unable, on account of his poverty, to give the bond and security on filing a counter-affidavit as required by the 4007th section of the Code; and prayed an injunction restraining the landlord from turning him out of the possession of the premises, until the final hearing of the bill, offering to deposit the monthly rents in the hands of a Receiver to be appointed by the Court. On a demurrer being filed to the complainant's bill, the Court sustained the demurrer, and dismissed the same:

Held, That, taking the allegations in the complainant's bill to be true, that the consideration for which the rent notes were given had failed, there was no rent due the landlord, and his remedy to prevent a removal from the premises was under the provisions of the 4007th section of the Code. Inasmuch as there is no provision made in the existing laws of this State to dispense with the bond and security required of the tenant on account of his poverty, a Court of equity cannot make such an exception. Equity follows the law but does not control or override it. The requirement of the law, that the tenant shall give bond and security to prevent an eviction from the rented premises, is as binding upon a Court of equity as a Court of law in such cases. The demurrer to the complainant's bill was properly sustained for want of equity. *Hall vs. Holmes*..... 179

4. When a contract was made by a freedman and a landlord to make a crop for one year, by which the landlord was to furnish the land and stock, and the freedman to work the same, and to receive for his labor one-half of the crop made thereon:

Held, That such a contract did not make them partners, and that if the landlord refused or neglected to pay or deliver to the freedman the one-half of the

crop made on the land, but appropriated the same to his own use, the freedman could make out an account against the landlord for the value of his share of the crop, and enforce the same by attachment or otherwise. It is the duty of the Courts to see that this class of contracts are performed in good faith on the part of the landlord to the laborer who makes the crop on his land, when the laborer performs his part of the contract. *Holloway vs. Brinkley*..... 226

5. Though notice to quit was not served upon the proper agent of the tenant, yet if the tenant got the notice it is sufficient. (R.) *Godfrey et al., vs. Walker et al...* 562
6. In a proceeding by trustees to turn out tenants of their church, their chairman may make the affidavit. (R.) *Ibid.*
7. It appears from the record, that on the 24th day of September, 1845, a deed was made to the land in dispute (upon which Andrew Chapel was afterwards erected) to trustees for the use of the colored members of the Methodist Episcopal Church, South, within the jurisdiction of the General Conference of such church, and that a large portion of the congregation using said house of worship, dissevered their connection with the Methodist Episcopal Church, South, and united with the African Methodist Episcopal Church, the trustees at the time permitting the occupancy of the church to such organization, and afterwards, in 1865, the parties presented their memorial to the Georgia Conference of the Methodist Episcopal Church, South, stating that they had associated themselves with the African Methodist Episcopal Church, and requesting that this property be ceded to them, and the Conference replied that the titles to the house of worship used by colored charges of their church were vested in trustees, and that they had no power to convey the property to any other organization whatever, but recommended that the colored people who were lately members "of our church" be permitted to use them to worship in. And such action was properly notified to the parties, and they continued in their use of the church; and in September, 1868, a notice to quit was served, responded to in January, 1869, declining to give up the possession until compelled by law; and the chairman of the

board of trustees made affidavit under the 4005th s section of the Revised Code, to which a counter-affidavit was filed under section 4007; and issue joined, and the Judge charged the jury, in effect, that except it appeared that the defendants were members of the Methodist Episcopal Church, South, the plaintiffs were entitled to recover.

Held, Under the facts in this case, that the title to the property vested by the deed in the trustees for the use of the colored members of the Methodist Episcopal Church, South, and just as soon as the members severed this connection, which was perfected by their uniting with the African Methodist Church, that instant they surrendered all legal right as beneficiaries to the use or occupancy of the church, and all claims except at the will or sufferance of the legal owners. *Ibid.*

Held again, Under the facts in the case, that their occupancy after notice of the permission to occupy, constituted them tenants-by-suffrance, under the Code, to the legal owners. They were lawfully in possession before they ceased memship, and their remaining by permission of the lawful owners afterwards, was under the changed relation, established, by their severance from the membership of the church, and did not relate back to their original possession as members of the Methodist Episcopal Church, South. They were not trespassers, for they had permission; nor were they owners, for they had no color of title. They were not tenants-at-will, for they were not in under contract, and their *status* was that of tenant-by-suffrance, and subject to be removed under the 4005th section of the Revised Code of this State. *Ibid.*

LAST ILLNESS. See *Wills*.

LICENSE.

See *Municipal Corporations*, 1.

LIEN OF JUDGMENTS.

1. Where, upon the trial of claim, it appears that the claimants bought from the defendants in *fi. fa.* real estate, and the judgment was rendered before the purchase, and the claimants have been in possession over

four years prior to the levy, and on this state of facts the lower Court was requested to charge the jury, "If claimants had actual notice of the judgment of plaintiff when they bought, then they were not such *bona fide* purchasers in the sense of the law, as can be protected against the judgment by a four years' possession prior to the levy," which the Court refused:

Held, That such refusal by the Court was not error, but was in conformity with the decision of this Court in 39th Georgia; that the right of the plaintiff in *fi. fa.* to enforce his lien on land sold by the defendant and held in possession by a *bona fide* purchase, existed with the condition that the levy be made within four years after the commencement of the possession. LOCHRANE, Chief Justice. *Sanders vs McAffee*..... 250

2. The lien of judgment does not constitute a right of property in the thing itself, but only a right to levy on it and sell it, and this under conditions and limitations of law; and while all the property of the defendant is bound from the date of the judgment, it is not such *a lien on all*, as constitutes bad faith in a purchase of part, if ample property was left in defendant's possession; such purchase may be, in the strictest sense, *bona fide;* for the *lien* only exists, in fact, upon sufficiency of defendant's estate to satisfy it, and excesses in levies are trespasses under the law. LOCHRANE, Chief Justice. *Ibid.*

3. The purchaser from defendant in *fi. fa.*, for valuable consideration, holds adversely, from the commencement of his possession to the judgment creditor, and with notice to him that at the expiration of the four years his property ceases to be subject to levy, for the satisfaction of his judgment; and it requires diligence on his part to comply with the provisions of the law, in collecting his debt out of the defendant's property. LOCHRANE, Chief Justice. *Ibid.*

4. A purchaser who buys property from a defendant in *fi. fa.* is not *per se* committing fraud; the judgment being a lien, the purchase is no fraud, for the creditor can levy on it any time to make his money, within four years. And if the purchase is not a fraud, the notice cannot make it so; for with or without notice, the lien can be enforced, within the time, by the creditor, and if the presumption of fraud is made to de-

pend on the lapse of time, or after the four years from notice, it would be a violation of all the rules of law to authorize such presumption. LOCHRANE, Chief Justice. *Ibid.*

5. Inasmuch as judgment creditors are neither hindered or debarred in the collection of their debts by such purchase from the defendant in *fi. fa.*, the purchase is not in any legal sense fraudulent; and when the consideration has been full and ample, in the sense of the law, the purchaser is a *bona fide* purchaser within the meaning and provisions of the Code. LOCHRANE, Chief Justice. *Ibid.*

6. If the purchase of a part of the estate of another, upon full consideration, without any legal fraud, even though it divest the rights of creditors whose claims are not in judgment, is *bona fide*, much more will it be regarded so, as against judgment creditors whose liens are not divested, and who are neither hindered nor delayed in collecting their debts by such purchase. LOCHRANE, Chief Justice. *Ibid.*

7. *Held, again*, That *bona fide*, as applied to purchases for valuable consideration, in the law, means such purchasers as act without *covin, fraud or collusion*, one who, in the commission or connivance at no fraud, pays full price for the property, and in good faith honestly and, in fair dealing, buys and goes into possession. And, as to such purchaser, the law will protect him in his title after the lapse of four years. LOCHRANE, Chief Justice. *Ibid.*

8. MCCAY, concurring. A *bona fide* purchaser for a valuable consideration of real property, who has remained in the possession of the premises four years under his purchase, undisturbed by a judgment against the vendor, holds the property discharged from the lien of the judgment, notwithstanding he knew of the existence of the judgment at the time of the purchase. *Ibid.*

9. WARNER, J., dissenting. Four years possession of land by one having actual notice of a judgment lien thereon, does not defeat such lien. (R.) *Ibid.*

10. Where A, as administrator of C, filed his bill of interpleader, in which he alleged his intestate left property to which he held bond for titles from Col-

lier, that the property had been sold and the fund arising therefrom is claimed by several persons who allege their priorities, who were made parties, and on the hearing it appeared that one of the claimants held a judgment lien against the vendor, and the main question was whether a transferee of the notes given for the purchase-money by such vendor was entitled to priority over said judgment, etc.:

Held, Under the facts in this case, the verdict of the jury decreeing a good title to the purchaser upon his full compliance with the terms of sale, and in favor of the administrator for his actual expenditures upon the property and for administration fees and reasonable counsel fees, was correct. But it was error to apply the balance of the proceeds arising from the purchase-money to the payment of the notes transferred by the vendor in preference to the judgment lien against such vendor; and we direct the decree to be so entered as to apply the balance first to the payment of such judgment lien. *Wimberly vs. Brown et al*..... 604

LEX LOCI CONTRACTUS.

See *Principal and Surety*, 2.

LOST PAPERS.

See *Evidence*, 3, 7.

MARSHALING ASSETS.

A bill in equity to marshal the assets of an estate, filed by an administrator, setting forth that the estate cannot pay all the claims upon it, that there are various creditors claiming preference in the distribution, (which claims are set forth in detail,) and that other creditors dispute this priority, is properly filed, and is not demurrable for want of equity. *Jeter vs. Barnard & Co*..... 43

MESNE PROFITS.

See *Ejectment*, 4.

MILLS.

See *Constitutional Law*, 6.

MINORS.

See *Relief Acts of* 1868 *and* 1870.

MISTAKE.

See *Equity*, 6, 7, 8, 9, 10, 11.
" *Sheriffs*, 2.

MUNICIPAL CORPORATIONS.

1. When, by the charter incorporating the city of Milledgeville, no express power is granted to the city to grant license for retailing spirituous liquors within the corporate limits thereof:

Held, That, until such power shall be expressly conferred on the city, the Ordinary of the county, under the general law of the State, has the power and authority to grant such license; but when an incorporated city has the power and authority expressly conferred by its charter to grant such license, and does grant it, and the fees therefor are as much as required by the general law of the State, then the Ordinary of the county cannot require a license from those who reside within the incorporated town or city for retailing spirituous liquors therein. The express grant to the incorporated town or city to grant the license to retailers of spirituous liquors within the corporate limits thereof, excludes the right of the Ordinary of the county to tax them under the general law of the State, as retailers of spirituous liquors, when licensed by such incorporated town or city in the manner before stated. *Ordinary of Baldwin county vs. Liquor Dealers*..... 325

2. The use of steam engines to draw trains of cars over the street railroad, laid down by the Augusta and Summerville Railroad Company, through Washington street, in the city of Augusta, is expressly authorized by Acts of the Legislature of this State, and by the contracts and ordinances of the city of Augusta, and being so authorized, the running of said trains cannot be abated as a public nuisance, under the Revised Code of this State, even though such use "tend to the immediate annoyance of the citizens in general." *Vason vs. So. Ca. R. R. Co*..... 631

3. Whether the Court of equity will now restrain the unreasonable exercise of said privilege, so as to interfere with the ordinary use of the street by the citizens, as not within the scope of the privilege granted by the Legislature, and whether property holders upon the street, who are damaged by the use of the same, even within the scope of legislative grant, may recover, are questions which cannot be made in a pro-

ceeding to *abate* the use complained of as a *nuisance*, and upon these questions this Court expresses no opinion. *Ibid.*

See *Taxation.*

NEGATIVE TESTIMONY.

See *Evidence*, 4, 5.

NEGLIGENCE.

See *Common-Carriers.*
" *Railroads*, 1, 2.

NEWLY DISCOVERED EVIDENCE.

See *New Trials*, 16, 17, 18, 19.

NEW TRIALS.

1. When there is evidence either way to a material fact, as in case of bailment, as to what negligence has or has not been shown, and the jury have determined the question by finding a verdict:
Held, That the Court, under such circumstances, will not disturb it. *Brunson vs. Sparks*..... 35

2. Where the Court below granted a new trial upon the ground that the verdict was contrary to the evidence, and it appears from the record that there was conflicting evidence in the case, and sufficient testimony to have sustained the finding of the jury:
Held, That, while this Court will, reluctantly, interfere with the province of the Court below in granting new trials, yet, it is important to the fair administration of justice that, in all cases where the verdict of the jury is not strongly and decidedly against the weight of evidence, new trials on this ground ought not to be granted. *Salter vs. Glenn, Duffield & Company*..... 64

3. Where, during the trial of a cause in Court, two jurors go into a grocery to take a drink with a third party, and meet one of the parties plaintiff in the grocery, and the other party is called in, and takes a drink, and before leaving the party, defendant, thus called in, treats to cigars, and one of the jurors takes from his roll of money a twenty-five cent piece, and hands

it to the bar-tender, and the same juryman also takes off the bottle of whiskey, all this being known to the plaintiff, and transpiring in his presence:

Held, That such conduct by jurors is reprehensible, and the exculpatory affidavits filed do not relieve it of all obnoxious appearances. Yet as the plaintiff was cognizant of it, and informed his counsel, and no motion was made in the premises, but the case went on to verdict without objection, the granting a new trial, on this ground, was not authorized under the rules of law. *Ibid.*

4. When the Judge charged the jury that, whilst it is true, as a general rule, that two or three witnesses are better than one, and will be more readily credited, yet, in this case, upon the point of what this contract was, if the jury believed that the contract was made between one of the plaintiffs, Mr. Wright, alone, and the defendant, it is witness against witness, and the plaintiffs cannot sustain their version of the contract without additional proof:

Held, That such charge was error; that the witnesses, being both of them parties, the case ought to have been submitted to the jury to determine the credibility under all the facts and evidence of the case, and that the Court ought to have granted a new trial on this ground. *Ibid.*

5. Where there was a question of fact as to whether there had been a formal gift by the father to the son, of real estate, with delivery of posssession, under such circumstances as made the gift good against creditors of the father, and there was evidence on both sides, and the whole question of law and fact was submitted to the Judge, this Court will not disturb his judgment, unless it be strongly and decidedly against the evidence. *Mims vs. Ross et al*..... 121

6. Where there has been a verdict of the jury upon the merits of the issue betwwen the parties, and the Judge refuses a new trial, this Court will not disturb the verdict, if there be any evidence to sustain it. *Bruce vs. Turner*..... 146

7. Where, in a matter of fact, evidence has been submitted to the jury, and the charge of the Court has fairly presented the questions at issue and the law thereon

to them, and they have found a verdict sustained by such testimony:

Held, That this Court will not grant a new trial or reverse the Court below refusing to grant a new trial upon this ground. *The Newton Manufacturing Co. vs. White*.. 148

8. A motion for a new trial, on the ground that the verdict was strongly and decidedly against the weight of evidence, and without evidence to support it, and contrary to law and the charge of the Court, was properly overruled by the Court below, there being sufficient evidence in the record to sustain the verdict, of which the jury were the proper judges, and not the Court. *Raden vs. Tompkins*..... 163

9. There being sufficient evidence to sustain the charge of the Court, and the verdict of the jury, the Court below refusing a new trial, ought not to be interfered with or set aside. *Lyon vs. Williams*..... 168

10. *Held further*, That the judgment of the Court below be reversed and a new trial be granted, so as to allow the verdict to be corrected, in accordance with the reasonable intendment and construction thereof; unless the plaintiff shall consent to enter up his judgment thereon for the sum of $707 10 for his principal debt, with interest thereon from the time the same became due, the interest to be calculated on the obligation payable on demand, from the 14th day of September, 1869, the date of the commencement of the suit; and upon the plaintiff consenting to do so, that the judgment of the Court below stand affirmed. *White vs. Blasland*..... 184

11. Where the verdict of a jury in an equity case was directly contrary to the testimony of three witnesses, sworn on the trial, and directly contrary to the answer of the defendant in a matter responsive to the bill, but was strongly supported by the admissions the defendant made in writing, before suit was brought and by his admissions under oath in giving in his taxes, for seven or eight years, and the Judge below granted a new trial:

Held, That whilst this Court is not exactly satisfied with the judgment of the Court below, yet, as the case is one of *granting* a new trial, so that the parties may

have another hearing, we do not think the discretion vested by law in the Judge of the Superior Court has been abused, and will not therefore disturb his judgment. *Walker et ux vs. Jackson*..... 217

12. Although we think the Court erred in its charge to the jury in relation to the question of tender, and in relation to other points involved in the case, still the verdict was right, under the law applicable to the facts, as disclosed by the record, and we affirm the judgment of the Court below in refusing a new trial. *Lester et al. vs. The Georgia R. R. & Banking Co.*... 244

13. Where illegal testimony has been improperly admitted by the Court, and the plaintiff has not made out such a case as entitles him to recover upon his titles:

Held, That the refusal to grant a new trial is error. *Anderson vs. Suggs*..... 265

14. The verdict of the jury being supported by evidence will not be disturbed, inasmuch as the matter of whether the factor had made such special contract, was a question of fact for the jury to decide, upon the whole evidence submitted to them. *Gray, Bedell & Hughes vs. Bass*..... 270

15. There was no material error in the charge of the Court to the jury which could have influenced their verdict. And where the verdict is abundantly sustained by the evidence, as in this case, this Court will not be very *astute* in the discovery of errors, to set it aside, unless they be such as would have probably produced a different result. *Wheeler vs. The State*... 306

16. An injunction to restrain the enforcement of a judgment at law on the ground that there is a good defense to a part of the claim on which the judgment is founded, but said defense did not come to the knowledge of the defendant, until it was too late to set it up at law, ought not to be granted, unless the complainant tender in the bill the amount he admits to be due, and unless the bill clearly show by distinct and positive averments what the defense is, how and by whom it can be proven, and that the failure to acquire the knowledge of it before the trial at law, was wholly unmixed with any negligence on the part of the complainant, or any want of attention to the

means of information within the reach of a man of ordinary prudence and discretion. *Hill vs. Harris*... 412

17. Diligence, and want of it, are questions of fact, to be determined by the jury, under the evidence and the charge of the Court, and a new trial ought not to be granted by the Circuit Judge, unless the jury find strongly and decidedly against the weight of testimony. In this case, the verdict is not strongly and decidedly against the weight of testimony, and as the case was fairly submitted to the jury, under the charge of Court, it was error in the Judge to grant a new trial. *Wallace vs. Clayton*..... 443

18. When a motion is made for a new trial, on the ground of newly discovered evidence, in the discovery a letter, testified to as the contract of the parties, and such letter referred to matters of defense proven on the trial:

Held first, That applications for new trial on this ground, and the question of diligence and materiality, and whether it is cumulative only or goes to the impeachment of a witness, and whether it would have changed the result, will be closely, if not critically, scanned by the Court. *Wallace vs. Tumlin and Stegall*..... 462

19. *Held again*, Where the newly discovered evidence is reconcilable with the other proof in the case, or if there appears, on the whole, sufficient evidence to support the verdict, the Court will not grant a new trial, especially where the Court below has violated no rule of law in submitting the case to the jury, and there is sufficient evidence to support it, and he has refused a new trial. *Ibid.*

20. An award of arbitrators under the arbitration law will not be set aside on the ground that it is illegal, because contrary to the evidence, unless it be so contrary to the evidence as to require the inference that it is the result of fraud, accident, or gross mistake of law or fact on the part of the arbitrators; and if an award has been attacked upon this ground before the Superior Court, under the provisions of section 4184 of the Revised Code, and the question has been submitted to a jury, who have found in favor of the award, and the Judge has refused a new trial, it must be a very strong case, indeed to justify this Court in

overruling the Judge and directing a new trial. *McCullough vs. Mitchell*..... 495

21. In a bill to reform a deed on the ground of mistake, when substantial justice has been done, even though the allegations in the bill may not have been precisely met by the proof, and the Court below have refused a new trial, this Court will not interfere on the ground of the variance, especially if there have been three concurrent verdicts in favor of reforming the deed. *Adair vs. McDonald et al*..... 506

22. While we do not affirm the principle of construction charged by the Court as the law of this case, nor accept the finding of the jury as strictly accurate, under our view of construction still, as it appears, from the credits and terms and time of the trade, that Mrs. Gilmer contracted to receive good currency in payment of the note, and the verdict accomplishes substantial justice between the parties, we affirm the judgment of the Court below. *Echols vs. Grattan*.... 547

23. When on the trial the Court permitted the proof of loss to go to the jury as evidence of the ownership:

Held, Such use of this testimony was not authorized; that the rule is, the proof of loss by claimant under his policy, may go to the jury to show his compliance with the terms of the policy, but is not evidence of ownership, loss, or value, but such must be established by proof under the rules of evidence. But as in this case the evidence is complete and uncontroverted upon the point, we do not regard it sufficient to set aside the judgment. *The Southern Insurance & Trust Co. vs. Lewis & Brothers*..... 587

24. When the Judge charged the jury, in his opinion, A had an insurable interest:

Held, That this was an improper mode of presenting the case. He ought to have called the attention of the jury to the facts, and then stated: "If you believe, etc., then in the opinion of the Court, under the law, you will find that he had an insurable interest." But, under the facts in this case, we regard the statement rather as a legal conclusion, than an opinion on the facts; and as the case was clearly made out, we do not think it sufficient ground to reverse the judgment. *Ibid.*

25. This Court will not interfere to set aside the verdict for a charge of the Court, though expressed in language too strong against the accused, if, from all the evidence, this Court is satisfied with the verdict. *Braswell vs. The State*..... 609

26. When on the trial of an action of ejectment the evidence turned on the question of title, and the verdict was for the defendant, and the plaintiff moved for a new trial on the ground of newly discovered testimony by which it could be shown that the defendant, whilst in possession of the land, had admitted that the same was the property of the plaintiff, he being the tenant, or in possession, as the agent of the plaintiff:

Held, That this did not come within the rule of excluding cumulative testimony, as it went to a new and distinct right to recover, and a new trial ought to have been granted. *Mills vs. May*..... 623

NON-SUIT.

1. Where the evidence of the plaintiff in the action is insufficient, in law, to entitle him to recover, the defendant may demur thereto and demand of the Court a judgment of non-suit; but, if the demurrer to the evidence is overruled by the Court, then the defendant, according to the long and well settled practice of the Courts of this State, may go before the jury and contest the plaintiff's right to recover, by the introduction of evidence in his own favor. The overruling the defendant's demurrer to the plaintiff's evidence has never been held by the Courts of this State, since the adoption of the Judiciary Act of 1799, to be *conclusive* as to the plaintiff's right to recover the money or property sued for. *Levy vs. Simmons*..... 53

2. Inasmuch as the evidence disclosed by the record does not show any evidence of title which, in law, would have entitled the plaintiff to recover the premises in dispute from the defendant, the non-suit was properly awarded by the Court below. *Jackson vs. Scroggins* 183

3. A non-suit will be refused if there be slight evidence to support plaintiff's case. (R.) *Barnett & Co vs. Perry & Smith*..... 283

4. Under the facts in this case, there was sufficient testimony to have caused the case to be submitted to the jury, and the settlement relied on, under the principle of accord and satisfaction, was not conclusive of the rights of the plaintiff, but constituted a defense which ought to have been submitted to the jury. *Parker vs. the Fulton L. & B. Association*..... 451

5. The motion to add additional testimony ought to have been allowed, under the rule laid down in *McColgan vs. McCay*, decided by this Court. *Ibid.*

NOTICE.

See *Lien of Judgments*, 1, 4, 8.
" *Promissory Notes*, 6.

NOTICE TO QUIT.

See *Landlord and Tenant*, 5, 8.

NOVATION.

1. Under the pleadings and facts of this case, the facts in controversy were properly submitted to the jury, and the charge of the Judge was a clear statement of the law governing it; "that if the administrator had charged himself with the debt, and became liable therefor, then the original debt was extinguished, and the note given to him individually was a novation, the consideration of which was the money advanced." *Lyon vs. Williams*..... 168

2. It is only in cases where there has been no novation of the contract, and the consideration is a slave or the hire thereof, that the Courts of this State are inhibited from exercising jurisdiction under the Constitution. But when payments have been given upon notes given since June, 1865, questions of fact arising under the pleadings upon suits brought to enforce such debts, when such consideration is denied and issue joined thereon, are the subject matter of judicial investigation to be submitted to a jury, upon evidence admitted under the rules of law. *Ibid.*

NUISANCE.

See *Municipal Corporations*, 2, 3.

NUNCUPATIVE WILLS.

See *Wills*, 2.

OPINION OF JUDGE.

See *Charge of the Court*, 3, 4.
" *Criminal Law*, 5.

ORDINANCE OF 1865.

As this was a Confederate contract, the measure of damages for a breach of the warranty of title to the fifty shares of stock, should have been left to the jury, under the provisions of the Ordinance of 1865, to have been decided by them according to the principles of equity as applicable to the contract between the parties. Although the Court gave in charge to the jury the whole of the Ordinance of 1865, yet, in other parts of the charge, the jury were restricted to the value of the Confederate bonds *at the time the contract was made*. It was error so to restrict the jury. They had a right to consider their value at any time, and render a verdict according to the principles of equity applicable to the contract between the parties. *Cohen vs. Ward*..... 337

PAROL CONTRACTS FOR LAND.

See *Insurance*, 2.

PARTIES. See *Pleading. Abatement.*

PARTITION. See *Equity*, 4. *Ejectment*, 1.

PARTNERSHIP.

When a contract was made by a freedman and a landlord, to make a crop for one year, by which the landlord was to furnish the land and stock, and the freedman to work the same, and to receive for his labor one-half of the crop made thereon:

Held, That such a contract did not make them partners, and that if the landlord refused or neglected to pay or deliver to the freedman the one-half of the crop made on the land, but appropriated the same to his own

use, the freedman could make out an account against the landlord for the value of his share of the crop, and enforce the same by attachment, or otherwise. *Holloway vs. Brinkley*..... 226

PART PERFORMANCE.

See *Statute of Frauds.*

PARTY AS WITNESS.

1. When the Judge charged the jury that, whilst it is true, as a general rule, that two or three witnesses are better than one, and will be more readily credited, yet, in this case, upon the point of what this contract was, if the jury believed that the contract was made between one of the plaintiffs, Mr. Wright, alone, and the defendant, it is witness against witness, and the plaintiffs cannot sustain their version of the contract without additional proof:

Held, That such charge was error, that the witnesses being both of them parties, the case ought to have been submitted to the jury to determine the credibility under all the facts and evidence of the case, and that the Court ought to have granted a new trial on this ground. *Salter vs. Glenn, Duffield & Co*..... 64

2. The testimony of the plaintiff was properly ruled out by the Court as against the administrator, whose intestate was dead. *Stotesbury vs. Lanier*..... 120

PLEADING.

1. When an action was instituted for rent of land by the plaintiff, who rented the premises to the defendant, and it was proved on the trial that the plaintiff was trustee for his wife and children, (the trust deed not being in evidence,) and that the rents and profits of the land belonged to the plaintiff:

Held, That the action was properly brought in the name of the plaintiff who rented the premises to the defendant, without declaring that he sued for rent as trustee. *Ponder vs. McGruder*..... 242

2. A count on an implied contract may be joined with one on a special contract, and that too by amendment. *Gray, Bedell & Hughes vs. Bass*..... 270

3. It is not sufficient to plead that a contract "was rescinded;" the plea should show how it was rescinded. (R.) *Barnett & Co. vs. Terry & Smith* 283

4. The fact that the defendant had an account against the payee of the notes, without more, was not a good legal defense against the plaintiff, who was the holder of the notes; to constitute a good equitable defense against the holder of a note received after due, that defense must be in some way connected with the debt sued on, or the transaction out of which it sprung; and such equitable defense should be set forth in the defendant's plea as fully in a Court of law as in a Court of equity, if he wishes to avail himself of such defense in a Court of law. *Ward vs. Winn*..... 323

PRACTICE IN SUPERIOR COURT.

1. After the testimony of the plaintiff was ruled out by the Court, the plaintiff having no other evidence to make out his case, the Court allowed a verdict to be taken in favor of the defendant:
Held, That the allowing of the defendant to take a verdict was error; that the Court should have dismissed the case. *Stotesbury vs. Lanier*..... 120

2. Where, upon issue joined on a sheriff's answer between two contesting judgments, claiming money raised by the sale of the property of defendant, it appeared, upon the trial, that the judgment of Thrasher was dated 10th of September, 1863, and on the 12th of May, 1862, the *fi. fa.* issued therefrom had an entry by the sheriff of costs received from the plaintiff; and it also appeared, in 1867, he had petitioned the Court for an order granting an *alias fi. fa.*, which was granted, and with the proceedings in March, 1867, was placed upon the minutes of the Superior Court, and it further appeared at the time of the sale of the property, a transcript of the record of judgment in January, 1868, was placed in the sheriff's hands at the time of sale, and in March, subsequent thereto, the *fi. fa.* was placed in his hands, and upon the trial of such issue this judgment *fi. fa.*, with the entries thereon were rejected by the Court, on the ground that it was dormant, to which exception was then made, and the Court, after the rejection of the

other *fi. fa.*, permitted the other contestants to take a verdict:
Held, That it was error in the Court to have permitted the verdict, under the facts in this case, as under his ruling rejecting the *fi. fa.*, there was no issue to try, and nothing which invoked the judgment of the jury, and that his judgment was, in effect, final, and came before this Court properly by appeal. *Thrasher vs. Foster*..... 212

3. If illegal evidence comes in without objection it should be ruled out upon a motion afterwards made for that purpose. (R.) *Anderson vs. Suggs*..... 265

PRACTICE IN SUPREME COURT.

1. Where the record failed to reach this Court in time for its regular term by reason of the sickness of the family of counsel for plaintiff in error, a motion to dismiss it, because not here in time, was overruled and the cause was ordered to be docketed for the next term. (R. See end of Report.) *Ellis vs. Rachels et al.* 175

2. In this case there being no appearance for the plaintiff in error, the defendant moved the Court to open the record, and prayed for an affirmance of the judgment of the Court below, with damages for delay:
Held, That the defendant was entitled to an affirmance of the judgment on the statement of facts contained in the record, and that damages be awarded as provided by the 4221st section of the Code for delay in bringing the case up to this Court. *Avera vs. Vason* 233

3. Where a case was continued at the first term for providential cause, and before the succeeding term the plaintiff in error died, and there was no representative of his estate, and when the case was called upon the docket, the death of such plaintiff was suggested, and motion was made to dismiss the case upon the ground that the constitutional provision requiring the Supreme Court to dispose of every case at the first or second term after writ of error brought, was imperative, and that the Rule of Court, where its application extended the hearing over or beyond the second term, was in violation of the Constitution:
Held, That the mandate of the Constitution relative to

the disposition of cases, did not apply to such as fell within the rule of providential cause; that by the Act of organization of this Court, and the Seventeenth Rule adopted under the old Constitution containing a like imperative provision, requiring the Court to "dispose of and finally determine each and every case on the docket of such Court at the first term" after writ of error brought, the provision relating to the making of parties in case of death, was the legal and proper construction of the Constitution in this regard, as provided for in the adoption of this Rule. *Worthy vs. Tate*..... 392

4. *Held again*, That the Constitution does not imperatively require the disposition of cases where the parties have died without affording the means of compliance with the Rules of this Court, and parties representative can be instituted to prosecute or defend the legal rights of the deceased. *Ibid.*

Held again, That at the first term succeeding the death of a party, it is not necessary to show diligence, in this that the death was so recent that parties could not have been procured to administer or qualify to bring the case within the rule of contingencies, even under our holding that a temporary administrator may be made a party to carry on the suit. But the death of the party is, in itself, such providential cause as will authorize a continuance at the term next succeeding the decease, where there is no representative of the estate of such deceased party, without proof of diligence at that term, and at that term only. *Ibid.*

6. Judgment affirmed, with instructions to deduct from the amount of the verdict $2 00 per month, with interest thereon for three years. *Wallace, Sup't, etc., vs. Tumlin & Stegall*..... 462

7. The bill of exceptions in this case was dismissed because it was not served till the eleventh day after it was certified by the Judge below. (R.) *Harrell vs. Grimes* 655

See *Bill of Exceptions.*

PRESUMPTION.

It is the right of the witness to have the testimony read over to him, but not the right of the defendant's counsel that it should be so read; the legal presumption is that all the legal testimony in the case was correctly taken down under the direction of the Court. *Anderson vs. The State*..... 9

See *Criminal Law*, 11.

PRINCIPAL AND AGENT.

1. When the evidence shows that, through the act of an agent, either of two innocent parties must suffer:
Held, That the rule of law is, the party putting such agent forward shall be the party on whom the law puts the liability. *Brunson vs. Sparks*..... 35

2. Counsel being authorized by the defendant to defend the suit, it was the duty of the defendant to have put his attorney in possession of such matters of defense as he conceived to exist in defense thereto, and a confession of judgment by counsel representing the case, with the knowledge and at the instance of the party, is sufficient in law without any special authorization to that effect; it followed as a legitimate incident of his professional relation to the case. *Lyon vs. Williams*..... 168

3. An action was brought by K. against V. to recover the value of one hundred bushels of corn, and on the trial it was proved that, in the latter part of the year 1866, V., who resided in Elbert county, wrote to Tate, in the city of Augusta, one of the firm of McCalla, Tate & Company, who were engaged in the produce and commission business, "to send me (him) two hundred bushels of corn, and when I come down you and I will arrange, or settle it." It appears from the evidence in the record, that Tate, or the firm of which he was a partner, did not have the corn, but Tate went to the house of the plaintiff and made an arrangement with him to send V. one hundred bushels of corn on V.'s credit, which was done, and the corn was charged to V. on the books of plaintiff. The corn was sent to V. by boat, and accompanying the corn was a bill made out against V. the defendant, there-

for, in favor of McCalla, Tate & Company, which was delivered to him when he received the corn. It also appears that the plaintiff had sued McCalla, Tate & Company for the corn, and failed to recover, but on what ground, the record does not show. The plaintiff then sued defendant, V., for the corn. On the trial, several witnesses were examined, and it was proved to be the custom of commission merchants, when orders were received from customers, to go to merchants and purchase the articles ordered, and have the same charged to the commission merchant, and the commission merchant charged the articles to the party ordering. The Court charged the jury that it was *doubtful* whether the order of the defendant made Tate his agent to purchase the corn.

Held, That under the order sent by defendant to Tate, he had the authority to purchase the corn, and to charge the defendant with the price thereof, and make the defendant *his* debtor therefor, but did not have the authority to authorize the plaintiff to sell the defendant corn, and thereby make the defendant *the plaintiff's debtor* for the corn. If the defendant received the corn and used it, with a full knowledge of all the facts, that would have been a ratification of the transaction, and the defendant would be liable to pay the plaintiff for the corn. *Ketchum vs. Verdell* 534

PRINCIPAL AND SURETY.

1. The right to enter up judgment against securities at the same time with their principal, exists only by statute, and can only be done in such cases where the statute has changed the common law. In cases of bonds *quia timet*, while the ultimate liability of such securities may be fixed as to the amount by the judgment against the principal, and the spirit of our law is to disencumber legal rights from unnecessary formalities or multiplicity of suits, still, in cases like the present, it requires a legislative act to authorize the Courts to apply the analogies arising under the grants of power conferred in cases of securities under other statutes, against securities on appeal, attachment, garnishment, *certiorari*, writs of error and claim. *Walker vs. Walker*..... 141

2. Section 2121 of the Revised Code of this State, providing that "the obligation of the surety is accessory to that of his principal, and if the latter, from any cause, becomes extinct, the former ceases, of course," is an affirmance only of the common law, and by the words "from any cause" is meant any cause dependent on the act or negligence of the creditor, and not such a cause as the discharge of the principal under the bankrupt law, which is beyond the control of the creditor, and by force of the laws of the land. *Phillips vs. Solomon*..... 192

3. When a plaintiff in error gives bond and security to obtain a *supersedeas* of the judgment, as provided by the 4203d section of the Code for the payment of the eventual condemnation money, and the judgment is affirmed, the plaintiff in the Court below may have an execution against the principal and security on the *supersedeas* bond without formally entering up the judgment against such security; the judgment of affirmance binds him as such security for the eventual condemnation money in that case, though an order on the minutes of the Court to that effect would make the record more perfect and complete. *Munroe vs. Dumas*..... 238

4. Where a suit was pending against two joint and several obligors, one of whom claimed to be security only for the other, and this was known to the plaintiff, and the principal had filed a plea to the merits of the action, and the plaintiff, without the action or consent of the surety, and after the surety, satisfied that no trial could be had on the plea at that term of the Court, had gone home, dismissed his suit as to the principal, to get clear of the plea, and then took a judgment against the surety, and the surety filed a bill to enjoin the judgment, alleging these facts, and alleging further, that at the time the suit was dismissed against the principal, the debt was barred by the Statute of Limitations, and if the surety paid the debt, he was, by this act of the plaintiff, deprived of his rights to recover it from the principal:

Held, That there was equity in the bill, and the Judge, on the facts of the case, as they appeared on the bill, answer and affidavits, ought to have granted the in-

junction until the trial could be had on the case made by the bill. *Turner vs. McCarter*..... 491

PRIORITY OF LIEN.

When the property of defendant was sold under a distress-warrant for rent due, and the question before the Court was whether the proceeds of the sale in the hands of the sheriff should be paid to the holder of a prior judgment against the defendant, or to the plaintiff in the distress-warrant who claimed a lien under a contract for a lease of the premises:

Held, That the lien specified in the contract between the landlord and tenant, set forth in the record, (not being for the crop raised on the premises) did not take precedence as to payment of an older judgment lien against the defendant: Code, 2260. *Levy vs. Twiname & Sumner*..... 249

PRIVATE PROPERTY FOR PUBLIC USE.

See *Constitutional Law*, 6, 7, 8.

PROCESS.

1. Where, in an action brought under the provisions of section 2988 of the Code, for stock killed, the notice required was served personally by the plaintiff, who attached his affidavit of such service thereto:

Held, That such affidavit was sufficient evidence of such service, and not being traversed, it was not necessary to have produced the witness on the stand to prove the same. *The M. & W. R. R. Co. vs. Baber* 300

2. Though notice to quit was not served upon the proper agent of the tenant, yet if the tenant got the notice it is sufficient. (R.) *Godfrey et al., vs. Walker et al* 562

PROMISSORY NOTES.

1. Where an action was brought by the plaintiff, as the bearer of two promissory notes, payable to W., or bearer, against the defendant, and, on the trial, the defendant offered in evidence his books of account, for the purpose of showing that W., the payee of the

notes, was indebted to him for goods and merchandize sold to him prior to the transfer of the notes, (it being admitted that the notes had been transferred by the payee to the plaintiff, after due,) and claimed that the amount of his account should operate as a payment of the plaintiff's debt, *pro tanto*, or be considered as an equitable defense to the plaintiff's action, which books of account were rejected by the Court:

Held, That the fact that the defendant had an account against the payee of the notes, without more, was not a good legal defense against the plaintiff, who was the holder of the notes; to constitute a good equitable defense against the holder of a note received after due, that defense must be, in some way, connected with the debt sued on, or the transaction out of which it sprung; and such equitable defense should be set forth in the defendant's plea as fully in a Court of law as in a Court of equity, if he wishes to avail himself of such defense in a Court of law. *Ward vs. Winn*..... 323

2. Where there was a suit pending in a Justice's Court, and the defendant moved to continue, on account of the absence of a witness, the payee of the note, by whom he could prove that the note was given in liquidation of a debt due to the payee, for medical services rendered by him to the defendant's ward, and that it was not the intent of the parties, in taking or giving the note, to bind the defendant, personally, for the debt:

Held, That there was nothing in this evidence, as stated, to show such a mistake, either of law or fact, as to authorize a reformation of the note, and the continuance was properly overruled. *Poole vs. Wilkinson*... 539

3. Suit was brought on three notes, of which the following is a copy:

"$1,761 33—Twelve months after date, I promise to pay Eliza F. Gilmer, or bearer, the sum of seventeen hundred and sixty-one 33-100 dollars, for value received; the said sum to be paid in currency, at the present rates, 148 to 100, or in whatever good currency may be used at the time the note falls due, with interest from date, December 1st, 1865."

And the defendant set up, by his plea, that the intention of the parties to the contract was, that the property purchased, for which the notes were given, was valued in currency, and the gold equivalent of the currency was made the standard of the payment, which at present rates, would reduce the amount of the principal due:

Held, That the principal due was a fixed amount, expressed in the face of the note, and that the sum stipulated to be paid is the principal due under the contract, and cannot be reduced by any theory of construction arising out of the terms of the instrument. *Echols vs. Grattan*... 547

4. *Held again*, That, while the legal intendment of the party may be inferred to mean currency, in the expression *dollars* in the note, such intendment is qualified by the terms of the contract; and the words, "the said sum to be paid in currency, at the present rates, 148 to 100," which was the value of gold at the time, bears intrinsic evidence that this provision for payment in currency, at a stipulated rate, was based upon a gold standard in the sum fixed to be paid in such currency. *Ibid.*

Held again, That the superadded words providing for payment in currency, at present rates, 148 to 100, or in whatever good currency may be used at the time the note falls due, strengthens the construction that the principal was the *sum fixed to be paid*, and the term *good currency*, contemplated by the parties, reasonably intended a better currency than that previously expressed, and that the plaintiff was entitled to recover the principal and interest, in good currency. *Ibid.*

5. McCAY, Judge, dissenting:

A promissory note made in 1865, payable, generally, in dollars, is payable in United States currency, and when the parties add to such a note the words "payable in currency, at the present rates, 148 to 100, or in whatever good currency may be used at the time the note falls due," the true construction is, that they intended to make the note payable in currency, at all events, but that it should be secured and paid as discharging more or less of the face of the note, accord-

ingly, as it should, at the time, be worth more less than the rates agreed on, to-wit: 148 to 100. *Ibid.*

6. The holder of a promissory note as collateral security, who takes it without notice, stands upon the same footing as any other innocent purchaser without notice. *Bonaud vs. Genesi*..... 639

PURCHASERS.

1. Under the deed from McLaughlin to White & McLaughlin, only an undivided half of the lot passed to White and the purchasers at the sheriff's sale, and those holding under that sale, hold only the interest of White; nor does the fact that McLaughlin saw the advertisement and was in the city at the time, but was not present at the sale, estop the wife or her trustee from setting up against said purchasers, her right to the other undivided half of the lot. *Logan vs. Goodall*..... 95

2. An action was brought by the plaintiff against the defendants, the one as tenant in possession, the other as the true claimant, to recover the possession of a lot in the city of Rome, which had been sold by the sheriff under an execution against the plaintiff, and purchased by S., alleging that the sheriff's sale of the lot to S. was fraudulent and void. On the trial the plaintiff proved, by his own evidence, that S. had sold the lot to M. for the sum of $1,350 00, and it also appears from the record that M. had sold the lot to H., one of the defendants, but for what amount, is not shown, nor are the deeds of conveyance set forth in the record. The jury found a verdict for the plaintiff. The defendants made a motion for a new trial on several grounds, one of which was that the Court erred in refusing to charge the jury, as requested by defendant's counsel, "that if they believed that S. obtained possession by a fraudulent purchase, yet, if the property was sold by him to M., and by M. to H., the defendant, then H.'s title will be protected, and the plaintiff is not entitled to recover, unless the evidence shows notice of the fraud in him." The Court granted a new trial in the case, and the plaintiff excepted:

Held, That in view of all the facts contained in the record, this Court will not control the discretion of the Court below in granting the new trial. *Buchanan vs. Higgenbotham*..... 198

See *Lien of Judgments*, 1 *to* 9.
" *Trustees and Trust Estates.*

RAILROADS.

1. When the defendant's counsel requested the Judge to charge the jury, "that Mrs. B. turning out the cow in the vicinity of the railroad just before the coming of the train, was negligence and carelessness to be considered by the jury, and that when said cow got upon the track it made B. a trespasser," which the Judge refused, but charged the jury, "that if it were shown that plaintiff's cow was injured by the defendant's servants, the law presumes negligence on their part and they must explain it, and the fact that Mrs. B. turned out the cow, in the vicinity of the railroad, before the train came, was no evidence of carelessness to be considered by the jury, and it was not true that if said cow, so turned out, got upon the track it made plaintiff a trespasser, unless it was inclosed by a lawful fence, such refusal and the charge given by the Court was not error, under the facts of the case; for the fact of contributory negligence cannot be presumed against the owner of such cattle as ordinarily are turned out, by turning such animals out, and the act of their going upon an uninclosed railroad track did not constitute him a trespasser. *The Macon and Western Railroad Company vs. Baber*..... 300

2. When, in a suit against a railroad company for a physical injury done to the plaintiff by the running of its cars, it was in proof that the plaintiff had been injured by the starting of the cars as he was passing under them after dark, whilst they were temporarily stopped at Gordon, taking in wood and water, the point of his attempted passage not being a public crossing:

Held, That the gross negligence and want of ordinary care on the part of the plaintiff, in thus undertaking to pass under the cars, brings him within section 2921

of the Revised Code of this State, and that he cannot recover, even by proof, that the engineer did not give the usual signal for starting the train, and a verdict against the railroad for damages will be set aside as illegal. *The C. R. R. and B. Co., vs. Dixon*..... 327

3. An action was brought by the plaintiff against the defendant to recover damages for the homicide of his wife, alleged to have been caused by the negligence of the defendant in the running of his engine and cars at the crossing of a public road over the defendant's railroad, and there was a special demurrer to the plaintiff's declaration, on the grounds: 1st. Because it is not alleged that the homicide, for which damages are claimed, was caused by *collision* with the engine or cars of defendant. 2d. Because the husband has no right, under the common law or statute law of Georgia, to maintain an action to recover damages for the homicide of his wife. The Court overruled the demurrer on both grounds, and the defendant excepted: *Held*, That the defendant is liable for an injury done to the person or property of another at a public crossing on his road, by the running of his engine and cars, resulting from the negligence of his agents and servants to blow the whistle of his engine or locomotive, as required by the 742d section of the Code, although there is no actual *collision* of the engine and cars with the person or property injured by such negligence, in all cases in which the plaintiff is entitled to sue for and recover damages under the law, for the alleged injury of which he complains, resulting from such negligence of the company, and that this ground of demurrer was properly overruled. *The Ga. R. R. & B. Co. vs. Wynn*..... 331

4. By the common law, the husband could not maintain an action to recover damages for the homicide of his wife, and, by the provisions of the Code of this State, authorizing damages to be recovered for *physical* injuries done by one person to another, the right to recover damages for a homicide is limited to a widow for the homicide of her husband, or if there is no widow, then the child or children may recover damages for the homicide of the husband or parent; but the Code does not give the right to the husband to

recover damages for the homicide of his wife. If the Legislature had intended to have changed the common law rule on this question, it would have done so when declaring the particular class of persons, who were entitled to recover damages for homicide, in the 2920th section of the Code. The Court below, therefore erred in overruling the second ground of demurrer to the plaintiff's declaration. *Ibid.*

See *Water Courses.*

REBELLION.

1. The fact that a partnership engaged in the foundry business, took and executed a contract with the Confederate Government, to furnish certain munitions of war, is not of itself sufficient to so vitiate the general proceeds of the business, as to render illegal a note given by some of the members of the firm to others, even though the note be based upon the proceeds of the general business. *Gullatt vs. Thrasher et al*..... 429

2. The seizing of cotton and provisions on Cumberland Island, on the Georgia coast, by the military authorities of the Confederate States, during the late civil war, to prevent the same from falling into the possession of approaching United States forces, was an act of war, and the individuals engaged in moving the same and transporting them to a place of safety within the Confederate lines, are not liable as trespassers to the owners of the property. *Stafford vs. Mercer et al*..... 556

See *Relief Acts of* 1868 and 1870.

RECEIPT.

See *Estoppel*, 1.

RECEIVERS.

See *Equity*, 1, 4.
" *Equity Pleading*, 1.
" *Injunction*, 12.

REFORMING CONTRACTS.

See *Equity*, 6, 8, 9, 10, 11.

RELIEF ACTS OF 1868 AND 1870.

1. The defendants also plead loss of property sustained by the war under the provisions of the Relief Act of 1868, and offered to surrender back the land to plaintiff and to rescind the contract, upon his accounting for the improvements made thereon and the purchase money already paid therefor. The plaintiff demurred to the defendant's plea, which was sustained by the Court.

Held, That, inasmuch as the defendant's plea did not set forth any equitable grounds of defense to the plaintiff's action by connecting the plaintiff, or his testator, in any way with the loss of their property, the demurrer to the defendant's plea was properly sustained by the Court below. *Coley et al., vs. Henry*..... 61

2. Where, in a proceeding under the Relief Law of 1868, setting up an equitable defense against a judgment obtained in 1860, it was alleged in the motion that the defendant's intestate (then in life) had, during the war, in 1863, sold a valuable real estate, on the assurance of the plaintiff that he would receive in payment of his judgment the proceeds, and it appeared in evidence that the plaintiff had agreed to receive "bank bills;" that the defendant's intestate had sold his said estate, taking as part of the consideration "bank bills;" then worth one for five of currency, and had by his agent, the sheriff of the county, tendered to plaintiff bank bills to the full amount of the judgment, which he refused, and the bills were left with the sheriff, who exchanged them for Confederate money, and then Confederate bonds, and the whole was lost; and the jury found the execution satisfied, and the Judge refused a new trial:

Held, That, whilst this Court is not exactly satisfied with the verdict, it not appearing positively that the agreement to take the bills was before the sale by the defendant of his property, yet, as there was evidence from which this might fairly be inferred, this Court will not control the discretion of the Court below in refusing a new trial. *Camp vs. Phillips*..... 289

3. When an action was brought by the guardian of minors to recover a contract debt, due and dated prior to the 1st of June, 1865, and the defendant intro-

duced evidence under the 14th section of the Act of 1870, showing losses occasioned by the war, and the Court charged, in effect, restricting the case to the provisions of that section, and the jury found the whole amount for the plaintiff, and defendant's motion for a new trial was overruled by the Court below:

Held, That the 14th section of the Act of 1870, relative to debts due widows or minors, is exceptional in the application of the general provisions of the Act, and the settlement upon principles of equity therein provided for, is controlled by the decisions of this Court; that to constitute such equity, it must appear that the losses of the defendant were, in some way, the fault of the plaintiff. *Nicholas et al., vs. Hovenor.* 514

REMARKS OF COURT.

Under the 4599th section of the Code, it was the duty of the presiding Judge to have had the evidence in the case taken down, that is to say, all the legal evidence allowed to go to the jury; but as the record does not show any particular facts given in evidence, which the Court instructed the Clerk not to record, this Court cannot say whether the same were material or immaterial, legal or illegal, or whether the Court in its directions to the Clerk, expressed, in the presence of the jury, any opinion as to the evidence which was legally submitted to the jury for their consideration. To have made it error, under the Code, it must be affirmatively shown that the Court expressed an opinion, in the presence and hearing of the jury, in regard to the evidence legally submitted to them on the trial. *Anderson vs. The State*..... 9

RENT.

See *Priority of Lien.*
" *Landlord and Tenant.*

RES ADJUDICATA.

1. A case was brought up to the Supreme Court by writ of error, alleging certain specified grounds of error to the rulings and charge of the Court below, and refu-

sal of the Court to charge as requested, and the writ of error was dismissed in this Court, on the ground that the original bill of exceptions and the record therein were not transmitted from the Court below within the time prescribed by the rule of this Court, and the judgment of the Court below was affirmed, as provided by the Constitution of this State. At the term of the Court at which the *remittitur* from this Court was made the judgment of the Court below, a motion was made for a new trial, on several grounds, under the provisions of the 3670th section of the Code, which motion was overruled, on the ground that the dismissal and affirmance of the judgment of the Court below was a bar to the granting of a new trial:

Held, That the defendant was not concluded from making a motion for a new trial on any legal or equitable grounds, except those specified grounds of error taken in the bill of exceptions which was dismissed; as to each of those grounds he was concluded, by the affirmance of the judgment, under the provisions of the Constitution, but not as to other grounds not contained in the bill of exceptions which was dismissed. *Perry et al. vs. Gunby*..... 41

2. The party plaintiff had his option to initiate his proceedings in the Court below by rule or action against the sheriff, or, waiving any step against him primarily, to have brought the matter for instructions to the sheriff before the Court, upon proper petition, making the defendants parties thereto. But having instituted proceeding by rule against the sheriff, officially, and the judgment thereon having been, under the provisions of the law, superseded during its pendency in this Court, the whole case was suspended, and the *fi. fa.* could not proceed at the instance of the plaintiffs in *fi. fa.* And it was proper in the Judge to decline such instructions, and especially as his judgment on the rule was already the adjudication of the question sought to be readjudicated by the petitioner. *Huson vs. Martin*..... 85

3. The judgment of this Court at the December Term, 1869, in the cause then pending between the parties in this very matter, was a final judgment upon the

points made in the affidavit of illegality, and now again brought before this Court, and the Court below did not err in dismissing the illegality. *Robinson et al. vs. Dumas*..... 614

4. Where two minor children were bound as apprentices by the Ordinary of Calhoun county, and the order stated that it was made upon the written consent of the parent, and on a *habeas corpus* by the parent, there was evidence strongly indicating that the parent had been imposed upon and did not understand the purport of the writing, and the Judge awarded the children to the parent:

Held, That this was no abuse of the discretion of the Court. *Hatcher vs. Cutts*..... 616

See *Equity*, 4.

RESCISSION OF CONTRACT.

1. When a party shipped flour to another, and the consignee declined accepting it, upon the ground that it was not such as he ordered, immediately notified the shipper of the fact and that he held it subject to his order, and the shipper afterward sent his agent to receive the flour, and the consignee set up his claim for freight and expense paid before delivery, and the agent declined paying the same and went off, leaving the flour in the consignee's hands, and he had it sold as the property of the shipper; and on the trial of the case, brought against the consignee, the Judge rejected the testimony of a witness showing the sale and what the flour brought:

Held, The Court erred; for the consignee had a right to be paid the actual amount of freight and expense on the flour, if it did not come up to what he ordered, which he was entitled to receive before he gave up the possession of the flour. *Barrett & Co. vs. Terry & Smith*..... 283

2. The consignee had the right, after reasonable notice to the consignor of such expense and its non-payment, to sell sufficient for his reimbursement, and if the commodity was perishable, to sell all, and by proof show his actings and doings in the premises; and the jury on the trial, to ascertain the value of such com-

modity, will consider as competent evidence what it actually brought, in connection with the mode and manner, and necessity of the sale. *Ibid.*

See *Pleading*, 3.

RULE AGAINST SHERIFFS.

See *Constitutional Law*, 4.

SERVICE. See *Process.*

SET-OFF.

A Court of equity will entertain a bill, for the purpose of setting off a debt due on a dormant judgment, when a *scire facias* is pending to revive it, against a judgment which is not dormant, when the plaintiff in the latter judgment, and defendant in the former judgment is *insolvent;* and will enjoin the collection of the judgment which is not dormant until the dormant judgment shall be revived, unless some good legal reason be shown why the dormant judgment cannot be revived. There was no error in the Court below in overruling the demurer to the complainant's bill, and this Court will not control the discretion of the Court below on the statement of facts contained in the record, in retaining the injunction until a trial can be had thereon. *Camp vs. Pace*..... 161

SHERIFF.

1. If a sheriff sell land and put the purchaser in possession without collecting the bid, he will be made to pay the money. (R.) *Avera vs. Vason*..... 233

2. Where a sheriff, by mistake, sold property on the first Tuesday in May, but discovered the mistake before the money was paid by the holder:

Held, That he could not be compelled by *mandamus* to make a deed and deliver possession to the bidder, on his tender of the amount of his bid. *Collins vs. Byrd.* 629

See *Slave Debts*, 2.

SLAVE DEBTS.

1. It is only in cases where there has been no novation of the contract, and the consideration is a slave or the hire thereof, that the Courts of this State are inhibited from exercising jurisdiction under the Constitution. But when payments have been given upon notes given since June, 1865, questions of fact arising under the pleadings upon suits brought to enforce such debts, when such consideration is denied and issue joined thereon, are the subject matter of judicial investigation to be submitted to a jury, upon evidence admitted under the rules of law. *Lyon vs. Williams*..... 168

2. When, in a rule against the sheriff, he answered that he had not made the money, because the *fi. fa.* issued upon a judgment founded on a note given for negro property, which was admitted on the hearing:

Held, That, while a sheriff is a ministerial officer, and it is his duty to execute all process placed in his hands, and let defendants set up their defenses to such process, yet, under Article V., section 17 of the Constitution, and Article XLI., section 6, there was no jurisdiction in the Court, upon such answer, to make the rule absolute against such officer, and that the exceptional character of the case and the constitutional inhibition of jurisdiction was protection of such officer in the premises against rule. WARNER, J., dissenting. *Rogers vs. Silas*..... 541

STATUTE OF FRAUDS.

A contract was made between the plaintiff and defendant, for the rent of a tract of land, to repair and build certain houses and stables thereon. Defendant was to repair and rebuild the fence, plaintiff to keep it and work it for two years and pay defendant one-third of the crops for rent. The contract was not reduced to writing at the time, but defendant promised to have it done at some future time, but neglected to do it. The plaintiff went on the land under the contract, cleared up one field, the work of which was worth $100 00, built and repaired houses, the work of which was worth $50 00, cultivated the land one year and paid the rent. Defendant would not consent for the plaintiff to remain on the land another

year, but rented the land to other persons and put them in possession of it. Plaintiff cleared up the land and did extra work on it, in order to get to stay on it two years. Defendant moved to dismiss plaintiff's case, on the ground that plaintiff sought to recover damages for the breach of a void parol contract, for the lease of land for more than one year, which motion was sustained by the Court, and the plaintiff excepted:

Held, That there was such a part of performance of the contract, on the part of the plaintiff as would take the case out of the provisions of the fifth paragraph of the 1940th section of the Code, and that it was error to dismiss the plaintiff's action on the statement of facts contained in the record. *Steel vs. Payne*..... 207

STAY-LAW.

1. The defendants also moved the Court to suspend the trial of the case under the resolution of the General Assembly, in the year 1870, suspending the proceedings of the several Courts of this State on debts and contracts made prior to the 1st of June, 1865, which motion to suspend the trial the Court overruled:

Held, That the resolution of the General Assembly was not a law binding on the Court, and that there was no error in the Court below, in overruling the motion to suspend the trial. *Coley et al., vs. Henry*..... 61

2. An execution was placed in the sheriff's hands, which issued on a judgment rendered since the first of June, 1865, and a rule was taken against the sheriff requiring him to show cause why he should not be attached for contempt of the process of the Court in failing to make the money due the plaintiff therein. And the sheriff shewed for cause that he had been notified by the defendant that the judgment on which the execution issued was obtained on a debt or contract made prior to the first of June, 1865, and that the collection thereof was suspended by a resolution of the General Assembly, passed in 1870; that the defendant promised to save the sheriff harmless in the event of his not proceeding to collect the same. Upon this showing of the sheriff the Court made the rule absolute against the sheriff for the amount due on the execution, to which the sheriff excepted:

Held, That there was no error in the judgment of the Court below in making the rule absolute against the sheriff, upon the showing set forth in the record, that the sheriff's duty was to have proceeded to collect the money due on the execution, unless the defendant had filed an affidavit of illegality thereto, or unless restrained by some other legal process, from doing so. *Martin vs. Huson*..... 83

STOCKHOLDERS. See *Corporations.*

SUPERSEDEAS. See *Res Adjudicata*, 2.

TAXATION.

1. The Ordinary of Glynn county, under the general law of the State, had only the right (in case the grand jury failed or refused to recommend the levy of an extra tax, for county purposes,) to levy such tax, not *exceeding fifty per cent.* on the State tax; *provided*, the levy of such extra tax was necessary to discharge any judgment against the county, or any debt, for the payment whereof there was a *mandamus* against the county, or for the necessary current expenses of the county for that year; and that the order levying such extra tax should clearly and distinctly specify the objects for which it is levied.

Held further, That the Ordinary of Glynn county had no authority, without the consent of two-thirds of the grand jury, to levy the extraordinary tax of one hundred and fifty per cent., under the Act of 1869, and that the Court below erred in not granting the injunction restraining the collection of the same. *Couper et al., vs. Rowe et al*..... 229

2. That portion of the General Tax Act, of 1869, which levies, for educational purposes, a specific tax of twenty cents per gallon on every gallon of brandy, gin, whisky, or rum, whether foreign or domestic, *sold* by any person in this State, in quantities less than thirty gallons, and which provides the mode by which returns shall be made for each quarter of the sales in *every* year, and fixes the penalty for failing to make the returns required, is within the power granted to

the Legislature by Article VI., section 3 of the Constitution, and is not controlled by section 27 of the Bill of Rights. WARNER, Judge, dissenting. *Kenny vs. Harwell, Meyer vs. McGowan*..... 416

3. A retail dealer in goods, wares and merchandise, who is also a retailer of spirituous liquors, and who has paid his license as such retailer of spirituous liquors, to the corporation of the city of Savannah, is not exempt from the special tax laid by the city of Savannah upon retailers of spirituous liquors, nor is such special tax upon retail dealers generally an illegal tax under the Constitution and laws of the State. *Burch vs. M. & A. of Savannah*..... 596

TENDER.

Where a tender of money is relied on, the Court may strike the plea, if the party has not the money ready to pay into Court. (R.) *Barnett & Company vs. Terry & Smith*..... 283

See *Relief Acts of* 1868 *and* 1870.
" *Equity Pleading.*

TRADE-MARKS.

1. Complainants alleged that they are entitled to the sole and exclusive right to manufacture and sell a certain preparation known as Dr. Simmons' Liver Regulator or Medicine, and have acquired right thereto by purchase, and that they have expended large sums of money in manufacturing and advertising it, by which it has become widely known and justly celebrated for the purposes it is intended to accomplish; and that they have adopted certain trade-marks, in which their packages are put up; and that the plaintiff in error has commenced to sell a preparation which he calls by nearly a similar name, and is putting it up in packages of similar form and size, and that the general appearance and printed endorsements thereon, is intended to take advantage of the reputation acquired by the prepation of Zeilin & Company, which they allege is a fraud upon their rights, etc. To which bill a demurrer was filed, which was overruled by the Court:

Held, That under the facts charged in the bill, admitted by the demurrer, this Court will not reverse the judgment of the Court below, upon the ground that the bill alleged sufficient *prima facie* evidence to predicate the claim of property in Zeilin & Company to the exclusive right, to make and sell such medicinal preparation sufficient to retain the bill until a hearing, upon the evidence to be submitted in the case. *Ellis vs. Zeilin & Company*..... 91

2. *Held again*, That in matters of trade-marks or labels to medical compounds, mere similarity of size, or square packages, or of classification of diseases or symptoms, is insufficient to invoke equitable interference, that compounding patent medicine is an open trade, and protection by law is only authorized when the invention itself or its own peculiar name and devices, are taken by appropriation and put upon the public in fraud of individual rights acquired by priority of use and title therein. *Ibid.*

TRESPASS.

An action of trespass *vi et armis* will not lie against the clerk of a warehouse-man, who, on the lawful receipt of goods in store for another, sells them on the advice of his employer, but without the consent of, or authority from, the owner. *Stafford vs. Mercer et al*..... 556

TRUSTEES AND TRUST ESTATES.

1. Where on the trial of an action of ejectment for a lot in the city of Macon, in favor of George M. Logan, trustee for Mrs. A. E. McLaughlin, it appeared that in 1830 McLaughlin and his wife, on ther marriage in Richmond county, entered into a marriage contract, in which McLaughlin covenanted with John T. Lamar, who was a party to and signed the deed, that his wife should have a separate estate in certain real and personal estate belonging to her before the marriage; that subsequently, in 1836, the city lot, of which the property in dispute is a part, was leased, with the proceeds of the separate estate for nine hundred and ninety-nine years from the city of Macon; that a deed of lease was taken to John T. Lamar, trustee for Mrs. E. McLaughlin; that in 1842 Lamar

died; that in 1842, McLaughlin conveyed the lot to White & McLaughlin, partners, McLaughlin being one of the firm, in consideration of one dollar; that in 1849 the whole lot was sold as the property of White, at sheriff's sale, under an execution against White only; that on the day of the sale the purchaser reconveyed the lot to White; that McLaughlin saw the advertisement of the sale, and was in the city on the day of the sale, but was not present at the sale; that the defendants, through several intermediate purchasers, hold a portion of the lot, under the title from White as the owner of the whole; that they had no notice of the marriage settlement, or of the facts that the lease was paid for with the separate funds of the wife, and have in good faith made valuable improvements upon it:

Held 1. That, under the marriage settlement, Lamar became, by operation of law, trustee for the protection of the separate estate, and if the lease was paid for by the separate funds of the wife, Lamar was in equity a trustee for her sole use of the lot conveyed in the lease; that at his death the trusteeship became vacant, and the Judge of the Superior Court might legally appoint a successor who could maintain ejectment on the title. *Logan vs. Goodall*..... 95

2. Although, by the law as it stood before the adoption of the Code, the deed "to Lamar, trustee for Mrs. McLaughlin," did not contain any words sufficient to exclude the marital rights of the husband, yet, as between the wife and her husband, or purchasers from him with notice of the wife's rights, or between her and wrong doers, marital rights did not in fact attach, and her trustee may, as against him, or purchasers from him with notice, or mere wrong-doers, maintained ejectment for the lot. *Ibid.*

3. Inasmuch as the deed to Lamar was to "Lamar, trustee for Wm. McLaughlin," it did not upon its face, as the law then was, exclude the rights of the husband, and persons dealing with him had a right to treat him as the true owner, and any purchaser from him or under him, without notice of the equitable rights of the wife, if the purchase be *bona fide*, will be protected against her rights. *Ibid.*

4. When there was a trust-estate for a woman and her children, and by the terms of the trust the husband was entitled to the annual income for the support of himself and family, without account, and an action was brought, at law, to make the trust-estate liable for necessaries furnished the beneficiaries and the trust-estate, and it appeared that the husband, owning a plantation side by side with the other, worked them together as one place, and, during the year, supplies were furnished him and goods sold to the hands on orders from him, as an advance on their part of the crop, and the share of the hands was, at the end of the year, to the extent of these advances, retained and sold with the general crop, and the jury found for the plaintiff the full amount claimed:

Held, That there was no error in the Court, in granting a new trial, on the ground that the jury found contrary to the evidence. *Pate vs. Lochrane*..... 57

5. On the trial of an action brought by the son, Stephen V., against his father as guardian, to recover the amount due him under the will of his grand-father, the Court charged the jury, that "if the defendant, as guardian for the plaintiff, loaned his money to persons good and solvent at the time of the loan, and used ordinary diligence to secure the debt, and such diligence as he used in his own business, and the debt was lost, he should not be held responsible for the loss, as he had a discretion to loan the money or not, as he might see proper:"

Held, That the charge of the Court as applicable to guardians and trustees, under the general law of this State, who are required to pay interest on the funds in their hands, was in substance a legal charge; yet, under the facts presented by the record in this case, the charge of the Court was error, inasmuch as it was clearly the intention of the testator, by his will, to secure the payment of *the principal sum* bequeathed to his grand-children on their becoming of age, in any event, and the guardian having received the money under the terms and provisions of the will, he is bound to conform thereto. He was not bound to pay any interest, and if he made any interest or profit from the use of the money, it was for his own benefit, the profits arising therefrom were exclusively his own,

and the risk was his own, if he lost the principal in loaning it to make interest for himself. *Walker vs. Walker*..... 135

6. An action of ejectment was instituted in the name of a trustee of a married woman against the defendant, to recover the possession of a tract of land, the title to which was claimed under a marriage settlement deed. The demise in the declaration was alleged to have been made by the lessor of the plaintiff in the name of the trustee of Melvina Adams, a *feme covert.* During the pendency of the suit, the husband of the *feme covert* died, and on the trial of the case, the Court allowed the declaration, on motion of plaintiff's counsel, to be amended, by striking out the name of the trustee, so as to leave the demise in the name of Melvina Adams as the plaintiff's lessor:

Held, That, under the provisions of the Code, there was no error in the Court in allowing the amendment, inasmuch, as on the death of the husband, the legal and equitable title to the land was in the widow, and that she could recover in her own name by showing title to the land in herself as the plaintiff's lessor. *Childers vs. Adams*..... 352

7. It is also shown, by the evidence in the record, that on the 26th June, 1848, Bennett Adams and Melvina Brinson executed an ante-nuptial contract, or marriage settlement, by which all the property she then had, or might thereafter have, should be her separate estate and property, the legal title of which was vested in a trustee for the joint use and benefit of herself and husband during her coverture, with power to sell and dispose of the property in any way she might think fit, in as ample a manner as if she was a *feme sole*, such disposition of said property by her to be the written conveyance, or other title papers that may be executed by the trustee named in the deed, with the consent of the said Melvina Brinson, *written and signed by her, upon said conveyance, or other evidence of title*, of the said named trustee. This marriage settlement was not recorded until the 8th January, 1857. On the 12th of January, 1857, the trustee named in the marriage settlement, conveyed the tract of land in dispute to Mrs. Melvina Adams, the legal effect of which, was to vest the title in her husband by virtue of his

marital rights; provided the conveyance had been made by the trustee in pursuance of the terms of the marriage contract, but the written consent of Mrs. Adams *upon that deed of conveyance*, does not appear, as required by the marriage settlement. On the 15th of January, 1857, Adams and his wife conveyed the land in dispute to McBryde. The evidence in the record shows, that she was coerced to join in the deed by the threats of her husband. The land was sold at sheriff's sale as the property of McBryde, and purchased by McGuire, who sold to the defendant. The evidence in the record shows that this tract of land was a part of the property which Mrs. Adams received from her father's estate, and was, therefore, a part of the property embraced in the marriage settlement:

Held, That the deed from the trustee, Ryals, to Mrs. Adams, not having been executed in accordance with the terms and manner prescribed in the marriage settlement, did not convey any title to her, or to her husband, to the land in dispute, and they not having any title under that deed, conveyed none to McBryde; that Mrs. Adams (the coercion of her husband being out of the question) did not convey the land in accordance with the mode prescribed in the marriage settlement, so as to defeat her right and title to the land secured to her by its terms and provisions. All the parties claiming to have purchased the land under McBryde's title, did so after the marriage settlement was recorded; and in any view that we have been enabled to take of this case, from the evidence in the record, the verdict of the jury was right, under the law applicable thereto, and we will not disturb it for any of the alleged errors complained of by the defendant. *Ibid.*

8. Where A made her will, in 1860, in which she gave $1,000 00 to S., as trustee for her grand-children, and appointed S. also executor of her will, and during the life of S. it was claimed in defense of this action, brought to recover the legacy from B., the administrator, *de bonis non*, etc., that he, S., had paid this amount, and upon the trial, in support of such defense, it appeared, by the proof of a Confederate States depository, that S. had invested certain funds in four per cent. certificates of such Confederate States,

the trustee not stating for whom; and also a loose paper memorandum, containing an entry, in his handwriting, of such fact being for the complainants, and there was proof of the bonds not being found, etc., and counter-testimony of an order granted by the Judge of the Superior Court authorizing such investment for the estate, and other *cestui que trusts* by name, but not these complainants, and his returns, and the jury, upon the facts, found for the defendants, and a motion for a new trial was overruled by the Court:

Held, That, under the facts in this case, the Court erred in overruling the motion for a new trial, upon the ground that the evidence was not sufficient to show that the money had ever been separated from the estate and paid to himself, as the trustee for the Faircloth children. *Faircloth vs. Brinson*..... 619

See *Amendments*, 2,

USURY.

1. Where an action was brought by a stockholder in a Building and Loan Association to recover back usury paid, in a settlement with them of the notes and mortgages executed for the sums of money he had received, and the plaintiff, being put upon the stand, testified, among other things, that in such settlement, he had paid over $3,000 00 more than principal borrowed and legal interest, and that the bill of particulars attached to his declaration was correct and showed *prima facie* evidence of such fact, and there was no proof of the constitution and by-laws of such Association before the Court, and the Court granted a nonsuit, and overruled the motion of plaintiff to open such case, and offer additional testimony:

Held, first, That usury voluntarily paid may be recovered back, under the laws of this State; Code, section 2025, declares the contract as to usury void, and is in affirmance of the principles of the common law, as has been settled by this Court, and is sustained by a long series of decisions, sanctioned by the highest and most eminent judicial authority. *Parker vs. The Fulton Loan and Building Association*..... 457

2. *Held again,* That the fact of plaintiff being a shareholder in such Association did not warrant the conclusive presumption against him, that there was no usury in its transaction; this may or may not appear from its constitution and by-laws, and the nature of its operations in loaning money, but without such proof it did not appear from the facts before the Court. *Ibid.*

VENUE. See *Criminal Law*, 11, 12.

VERDICT.

1. A suit was instituted for the recovery of the amount due on two promissory notes, or written obligations, made by the defendant, one of which was for the sum of $282 10, dated 8th August, 1868, due eight months after date, the other for the sum of $425 00, of the same date, due, on demand, after one year's time after the date thereof. The plaintiff offered as evidence the two notes or written obligations, and proved by plaintiff's attorney that some time after the expiration of twelve months from the date of the last named obligation, (the exact time not stated) he made a formal demand of the defendant for the payment thereof, which he declined to do, and thereupon closed his case, and the defendant introduced no evidence. The jury returned the following verdict: "We, the jury, find for the plaintiff seven hundred and seventy-one dollars and forty cents principal, with interest and costs of suit." The defendant moved for a new trial, on the ground of the refusal of the Court to continue the case, and because the verdict of the jury was contrary to law, and against the evidence, which motion the Court overruled, and the defendant excepted:
Held, That the reasonable intendment of the verdict is that the jury found for the plaintiff the principal sum due on the two notes or obligations sued on, with interest thereon from the time the same became due. *White vs. Blasland*..... 184
2. *Held further,* That the judgment of the Court below be reversed and a new trial be granted, so as to allow the verdict to be corrected, in accordance with the reasonable intendment and construction thereof; unless the plaintiff shall consent to enter up his judg-

ment thereon for the sum of $707 10 for his principal debt, with interest thereon from the time the same became due, the interest to be calculated on the obligation payable on demand, from the 14th day of September, 1869, the date of the commencement of the suit; and upon the plaintiff consenting to do so, that the judgment of the Court below stand affirmed. *Ibid.*

VOLUNTEERS. See *Equity*, 6.

WAIVER. See *New Trials*, 3.

WAR. See *Rebellion.*

WARRANTY.

1. Where, in a trade of horses, B. asserts certain material facts inducing the trade relating to the age and soundness of the horse, which prove to be untrue, and B. also promised, in case anything was wrong, to make it right:

Held, Upon a suit brought by S. against B. on the breach of warranty, that no particular words are necessary to constitute a warranty, and that the jury, under the facts of this case and the charge of the Court, were the proper judges of the intention with which such statements were made, and their finding for plaintiff was not contrary to law or evidence, and the Court committed no error in refusing a new trial on the ground taken. *Burge vs. Stroberg*..... 88

2. An action was brought by the plaintiff against the defendant to recover damages for a breach of an implied warranty of title to fifty shares of Central Railroad stock, alleged to have been sold by the defendant to the plaintiff in the month of April, 1863, and on the trial, it appeared from the evidence in the record, that the defendant sold to or exchanged with the plaintiff, one hundred shares of Central Railroad stock for $20,000 00 of Confederate States eight per cent. bonds. The contract was consummated between the parties, by the delivery and transfer of the railroad stock to the plaintiff, and the delivery and transfer of

the Confederate bonds to the defendant, in pursuance of that contract; but the defendant did not have the title to fifty shares of the railroad stock transferred by him to the plaintiff, the title thereto being in other parties. The jury, under the charge of the Court, found a verdict for the plaintiff for $2,000 00 in gold. The defendant made a motion for a new trial on several grounds of error alleged, as to the charge of the Court to the jury, and as to refusals to charge as requested, and because the verdict was against the law and the evidence. The Court overruled the motion for a new trial, and the defendant excepted:

Held, That under the pleadings and evidence in the case, the plaintiff was entitled to recover from the defendant for a breach of the implied warranty of title to the fifty shares of railroad stock sold and transferred by the defendant to the plaintiff under the contract, to which he had no title, and it made no difference, under the law of this State, whether it was a sale of stock for bonds, or a barter, or exchange of stock for bonds. As this was a Confederate contract, the measure of damages for a breach of the warranty of title to the fifty shares of stock should have been left to the jury under the provisions of the Ordinance of 1865, to have been decided by them according to the principles of equity as applicable to the contract between the parties. *Cohen vs. Ward*..... 33

WATER-COURSES.

Where A filed his bill against a railroad company, alleging that they were proceeding to sequester a spring of water belonging to him a quarter of a mile of the line of the road, without his consent, and had laid pipes through his land to obtain it, and were using the water, and the bill asked for injunction, etc., and on the hearing the Judge dismissed the bill for want of equity:

Held, Under the facts alleged in the bill and upon the construction of the charter of said road, the Court erred in dismissing the bill, it not appearing that the water is indispensable and cannot otherwise be obtained, and upon the view that there is, *prima facie*, a case made for equity jurisdiction entitling the com-

plainant to a hearing. *Strohecker vs. The Alabama and Chattanooga Railroad Company*..... 509

WESTERN AND ATLANTIC RAILROAD.

1. Where a suit was pending in a Court of this State against the Superintendent of the Western and Atlantic Railroad, upon the Act of 24th of October, 1870, to authorize the lease of said road, and before said lease was consummated:

Held, Under the 8th section of such Act, which provides for the settlement of the liabilities of said road by a board of commissioners therein named, *or until* the claim has been verified by a judgment of the Court having jurisdiction of the case, that the Court having jurisdiction of the case may proceed, under such jurisdiction, to a hearing, and by an appeal to this Court, under the rules of law. *Wallace vs. Tumlin & Stegall*..... 462

2. The Western and Atlantic Railroad was sought to be made liable for the loss of eight bags of cotton sent from Atlanta to New York, and which the said road had delivered to the next connecting railroad on the line, and it appeared that the Western and Atlantic Railroad had given two receipts for two lots of cotton, portions of each of which lots were lost beyond their line. One of these receipts simply acknowledged the receipt of the cotton and that it was consigned to New York, by way of Johnsonville, and the other contained the same acknowledgment, but was headed: Western and Atlantic Railroad, East Tennessee and Georgia Railroad, Virginia and Tennesse, and Orange and Alexandria Railroads, and had indorsed upon it, "Through freight contract." And it was in evidence by the shipper that the cotton was delivered to be shipped to New York; also in evidence by the railroad that there was an arrangement between it and the other roads, fixing the amount that each road would charge for the carriage of frieght over its road, but no other arrangement, and that this was a through freight contract:

Held 1. That the Western and Atlantic Railroad having been built by the State to carry freight and passengers between Atlanta and Chattanooga, it is a matter of

grave doubt if its officers can charge the State with a contract to carry freight beyond its terminus to distant points over other roads. *Baugh, Superintendent, vs. McDaniel & Strong* .....

3. That, at any rate, such a contract will not be implied, but must appear to have been distinctly made. *Ibid.*

4. That there is nothing in the evidence adduced in this case to make such a special contract, or to take the case out of the rule prescribed in section 2058 of the Revised Code, which is as follows: "Where there are several connecting roads under different companies, and goods *are intended to be transported over more than one railroad*, each company shall be responsible only to its own terminus and until the delivery to the connecting roads." *Ibid.*

WIDOW.

See *Dower*.
" *Relief Acts of* 1868 *and* 1870, 3.
" *Trustees and Trust Estates*, 6.

WILLS.

1. When, in 1858, Nathan Truitt died, leaving a will in which he bequeathed to be B certain negroes, (described as old and faithful slaves,) and certain other property in trust, directing that B should permit them, as long as any of them wish, to cultivate, for their support, a certain parcel of land, and see to it that they were well treated, and provided that, at B's death, before the death of all the negroes, the trust should pass to C, and after the probate of the will, no action was taken by B in the matter, and the negroes and other property passed in the usual course of administration to the residuary legatee, and since the emancipation of the slaves, B filed a bill to set up the trust:

Held, That the bill was properly dismissed by the Chancellor for want of equity. *Ellis vs. Rachels*..... 1

2. When a paper writing was offered for probate and record as the *nuncupative* will of a testatrix, dictated

nd signed by her during her last sickness, thirty days before her death, and attested by two witnesses: *eld*, That inasmuch as it did not appear from the evidence in the record that the testatrix was *in extremis* at the time of her dictating and signing said paper writing, or that she was prevented by any sudden surprise or providential cause, from executing the same in the manner as required by the laws of this State, said paper writing could not be established as a *nuncupative* will in the Courts of this State. McCAY, J., dissenting. *Ellington vs. Dillard*..... 361

WITNESS.

is the right of the witness to have the testimony read over to him, but not the right of the defendant's counsel that it should be so read; the legal presumption is that all the legal testimony in the case was correctly taken down under the direction of the Court. *Anderson vs. The State*..... 9
e *Party as Witness.*

WORK AND LABOR. See *Damages*, 3.